Supreme Court, U.S.
FILED
961507 MAR 21 1997
OFFICE OF THE CLERK

No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LA FUERZA AEREA BOLIVIANA,
An Instrumentality of the
REPUBLIC OF BOLIVIA,
A Foreign State,
Petitioner,

v.

TRANSAERO, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

GREGORY B. CRAIG
(Counsel of Record)
JOHN T. PARRY
WILLIAMS & CONNOLLY
725 Twelfth St., N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Petitioner
La Fuerza Aerea Boliviana

65pp

QUESTION PRESENTED

Is a foreign sovereign entitled to interlocutory review of its claim that it is not amenable to suit under the Foreign Sovereign Immunities Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. THE SECOND CIRCUIT IS IN CONFLICT WITH OTHER CIRCUITS ON THE NATURE OF FOREIGN SOVEREIGN IMMUNITY AND THE AVAILABILITY OF INTERLOCUTORY REVIEW 7

A. Foreign Sovereign Immunity Is Immunity From Suit 8

B. A Foreign Sovereign Is Entitled To Interlocutory Review When A District Court Denies Its Claim Of Immunity 11

II. THE SECOND CIRCUIT HAS UNDERMINED THE UNIFORMITY OF FEDERAL LAW THAT WAS THE EXPRESS PURPOSE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT 15

III. THE SECOND CIRCUIT'S DECISION CREATES UNCERTAINTY FOR FOREIGN SOVEREIGNS AND THUS HAS SIGNIFICANT FOREIGN POLICY IMPLICATIONS 17

CONCLUSION 18

APPENDIX A 1a

APPENDIX B 8a

APPENDIX C 10a

APPENDIX D 28a

APPENDIX E 30a

APPENDIX F 35a

TABLE OF AUTHORITIES

Page

CASES

In re Air Crash Disaster Near Roselawn, 96 F.3d 932 (7th Cir. 1996) 16
Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 8
Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528 (5th Cir. 1992), *cert. denied*, 506 U.S. 956 (1992) . . 12
Behrens v. Pelletier, 116 S. Ct. 834 (1996) 12
Bryant v. Sylvester, 57 F.3d 308 (3d Cir. 1995), *vacated on other grounds*, 116 S. Ct. 899 (1996) 14
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 13
Compania Mexicana de Aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354 (9th Cir. 1988) 8, 9, 12
Federal Ins. Co. v. Richard I. Rubin & Co., 12 F.3d 1270 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2101 (1994) 9, 14
Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990) 9, 12
Goar v. Compania Peruana de Vapores, 688 F.2d 417 (5th Cir. 1982) 16
Gould Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988) 9, 12
McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982) 14
Mitchell v. Forsyth, 472 U.S. 511 (1985) 12
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 12
Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 12, 13, 14
Pullman Construction Industries, Inc. v. United States, 23 F.3d 1166 (7th Cir. 1994) 10
Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 12

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) 13, 14
Saudi Arabia v. Nelson, 507 U.S. 349 (1993) 9
Segni v. Commercial Office of Spain, 816 F.2d 344 (7th Cir. 1987) 9, 12
Stena Rederi AB v. Comision de Contratos del Comite, 923 F.2d 380 (5th Cir. 1991) 9, 12
In re Surinam Airways Holding Co., 974 F.2d 1255 (11th Cir. 1992) 16
In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation, 15 F.3d 1230 (3d Cir. 1994) 16
The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) 9
Transaero, Inc. v. La Fuerza Aerea Boliviana, 24 F.3d 457 (2d Cir. 1994) 1, 5, 18
Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995) 5, 8, 12
Transaero, Inc. v. La Fuerza Aerea Boliviana, 38 F.3d 648 (2d Cir. 1994) 6
Transaero, Inc. v. La Fuerza Aerea Boliviana, 99 F.3d 538 (2d Cir. 1996) . . . . . *passim*
United States v. Moats, 961 F.2d 1198 (5th Cir. 1992) 14
Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 10
Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982) 12
Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 9, 15
Weldon v. United States, 70 F.3d 1 (2d Cir. 1995) 4
Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982) . . 16

STATUTES AND RULES

28 U.S.C. § 1254(1) 2
Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-1611 2

28 U.S.C. § 1602 . . . . . 2, 8
28 U.S.C. § 1603 8
28 U.S.C. § 1604 8
28 U.S.C. § 1605 . . . . . 2, 8
28 U.S.C. § 1608(a) . . . . . *passim*
N.Y. U.C.C. Law § 2-725(1)3

MISCELLANEOUS

H.R. Rep. No. 94-1487 at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611 15
Wright, Miller & Cooper, *Federal Practice and Procedure* (2d ed. 1985) 16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-____

LA FUERZA AEREA BOLIVIANA,
An Instrumentality of the
REPUBLIC OF BOLIVIA,
A Foreign State,
Petitioner,

v.

TRANSAERO, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this Case on November 6, 1996, and further prays that this Court summarily reverse the judgment of the Second Circuit.

OPINIONS BELOW

The opinion of the District Court is unreported and is reproduced in the Appendix at 10a. The opinion of the Court of Appeals dismissing the appeal for lack of appellate

jurisdiction is reported at 99 F.3d 538 and is reproduced in the Appendix at 1a.

JURISDICTION

The order of the United States District Court for the Eastern District of New York was entered on August 4, 1995. The judgment of the United States Court of Appeals for the Second Circuit was entered on November 6, 1996. A timely petition for rehearing and suggestion for rehearing en banc was denied on January 9, 1997 (App. 8a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case addresses the immunity of foreign sovereigns under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. The relevant provisions of the Act—§§ 1602, 1603, 1604, and 1608—are reproduced in the Appendix at 35a-39a.

STATEMENT OF THE CASE

In 1981 and 1982, La Fuerza Aerea Boliviana—the Bolivian Air Force—purchased $598,115.76 in aviation equipment from the respondent, Transaero, Inc. A one paragraph credit agreement drafted by Transaero provided for interest of 1.75% per month (a rate of 21% per annum) on purchases not paid for within 120 days of shipment.

The Air Force does not dispute that its payments were late. The delay is attributable, at least in part, to the political and economic chaos that afflicted Bolivia in the early 1980s. During the period in which Transaero sold its products to the Air Force, for example, Bolivia was ruled by three successive military governments. In October 1982, Bolivia regained a civilian government, but the country remained in turmoil. The economy collapsed; payments to

foreign creditors were suspended; and inflation soared to a yearly rate of 28,000% for the first nine months of 1985.

In the midst of these difficulties, the Government of Bolivia sought to satisfy its debt to Transaero. On October 30, 1984, the Air Force paid Transaero $381,688.29 against the outstanding balance, leaving $216,427.47 in unpaid principal. In December 1985, the Air Force entered into negotiations aimed at settling the account. The Economic Counselor at the U.S. Embassy in La Paz negotiated on behalf of Transaero, and the Bolivian Ministry of Finance negotiated on behalf of the Air Force. Bolivia offered to pay the balance of the principal ($216,427.47) plus an additional $50,000 to compromise the accrued interest. Transaero accepted the offer and the Air Force made the payment on January 6, 1986, thinking it had settled the matter.

Five months later, Transaero demanded payment of an additional $626,565.27 in interest, including interest that purportedly had accrued since the settlement. The Air Force declined to pay this sum.

On September 8, 1988, Transaero filed suit in the Eastern District of New York, seeking $983,696.60 in allegedly unpaid principal and interest—even though Bolivia already had paid the principal in full.[1]

Transaero served the Complaint by registered mail sent to an office address in La Paz and did not comply with 28 U.S.C. § 1608(a)'s requirements for service on foreign states

---

[1] The Complaint was filed more than 6 years after the Air Force's last purchase of equipment. See N.Y. U.C.C. Law § 2-725(1) (four-year statute of limitations on sales of goods).

or their political subdivisions.[2] The Air Force did not appear to defend the case, and the District Court entered a default judgment against it on April 28, 1989, in the amount of $983,696.60.

In June 1992, Transaero registered and sought to enforce the judgment in the District Court for the District of Columbia. The Air Force moved to dismiss the proceedings, arguing that the Eastern District of New York had lacked personal and subject matter jurisdiction because Transaero had not complied with the service requirements of 28 U.S.C. § 1608(a). In an unreported decision issued on September 25, 1992, the District Court denied the motion and ruled that service was properly made under 28 U.S.C. § 1608(b) because the Bolivian Air Force was merely an "agency or instrumentality" of the government of Bolivia.

The Air Force filed an interlocutory appeal with the Court of Appeals for the District of Columbia Circuit. While the appeal was pending, the Air Force asked the Eastern District of New York to set aside the default judgment on the ground that it had been procured by fraudulent misrepresentations.[3] The court denied the motion.

---

[2] In subsequent proceedings, the highest ranking member of the Bolivian Air Force declared under penalty of perjury that the Air Force did not learn of Transaero's suit until February 1992. See App. 33a-34a.

[3] The Air Force's counsel believed it had a duty of professional responsibility to raise the issue of fraud once it became aware of the issue, and to do so "in the very court that rendered the judgment." *Weldon v. United States*, 70 F.3d 1, 4 (2d Cir. 1995). In its moving papers, the Air Force maintained its claim that the District Court lacked subject matter jurisdiction and expressly preserved its jurisdictional defense under the Foreign Sovereign Immunities Act—*i.e.*, that the plaintiff had failed to comply with the Act and that the District Court's default judgement was void and unenforceable—which were issues on appeal at that moment before the D.C. Circuit. See App. 30a-31a.

The Second Circuit affirmed but remanded for the purpose of "assessing the factual accuracy" of Transaero's interest claims and, "if necessary, recalculating the award." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 24 F.3d 457, 463 (2d Cir. 1994). In a petition for rehearing, the Air Force sought a stay of the mandate until the D.C. Circuit ruled on jurisdiction.

Two months later, the D.C. Circuit ruled that the Bolivian Air Force was a "foreign state or political subdivision" of the Republic of Bolivia, and that Transaero had not met the service requirements of 28 U.S.C. § 1608(a). *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994). The court concluded, "The Eastern District of New York lacked personal jurisdiction, and the default judgment registered in the District of Columbia was therefore void and unenforceable." *Id.* at 154. This Court denied Transaero's petition for a writ of certiorari. 115 S. Ct. 1101 (1995).

After learning of the D.C. Circuit's decision, the Second Circuit issued an opinion on rehearing. While noting that, "[a]t oral argument on the appeal, both sides took the position that the adequacy of the notice that initiated the Eastern District suit would be resolved by the then-pending appeal in the D.C. Circuit," the court refused to take any action as a result of the D.C. Circuit's ruling:

> [W]ithout expressing any views as to (a) the validity of Transaero's service upon BAF in initiating the Eastern District suit or (b) whether the default judgment is impaired by the allegedly late notice of its entry, we decline to grant the petition for rehearing just because the D.C. Circuit has ruled that the default judgment is not enforceable in the District of Columbia. We need not decide whether BAF is entitled to pursue a new Rule 60(b) motion in the Eastern

> District, now that the D.C. Circuit has declared the default judgment to be void.

Transaero, Inc. v. La Fuerza Aerea Boliviana, 38 F.3d 648, 649-50 (2d Cir. 1994).

Following the Second Circuit's suggestion and in reliance upon the D.C. Circuit's ruling, the Air Force filed a motion in the Eastern District of New York to set aside the default judgment and dismiss the Complaint. The District Court denied the motion, ruling that the Air Force had waived the claim because "[a]t no time . . . did the Air Force object to the lack of personal jurisdiction." App. 18a. In a Motion for Reconsideration, the Air Force directed the court's attention to its express preservation of its jurisdictional defenses, but the court denied the motion in a single sentence. App. 28a.

The Air Force sought to take an interlocutory appeal to protect its immunity, but the Second Circuit dismissed the appeal for lack of jurisdiction. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 99 F.3d 538 (2d Cir. 1996); App. 1a. The court recognized that "the right not to be sued at all" may be lost if there is no provision for interlocutory review, *id.* at 541; App. 6a, but held that the Bolivian Air Force did not possess such immunity. Instead, the court characterized the Air Force's immunity, if any, as the right "not to be subject to a binding judgment," and ruled:

> Because BAF's right not to be subject to a binding judgment may be effectively vindicated following final judgment, the denial of the claim of lack of jurisdiction is not an immediately appealable collateral order.

Id.; App. 7a.[4]

REASONS FOR GRANTING THE WRIT

This case presents a single issue: whether a foreign sovereign is entitled to immediate interlocutory review of a district court's denial of the sovereign's claim that it is not amenable to suit under the Foreign Sovereign Immunities Act. The Bolivian Air Force does not seek a ruling from this Court on the merits of its claim; it seeks only the right to have that claim heard on interlocutory review before it is subjected to further proceedings in the district court.

The Second Circuit's ruling that foreign sovereigns have no right to immediate interlocutory review of a denial of immunity under the Foreign Sovereign Immunities Act creates a conflict among the circuits over the nature of foreign sovereign immunity and the availability of interlocutory review for denials of that immunity, undercuts the Act's purpose of creating a uniform body of federal law on the issue of foreign sovereign immunity, and effectively strips a foreign sovereign of the immunity from suit guaranteed to it by the Act. Petitioner asks that this Court exercise its power to undo these errors by granting the petition for writ of certiorari and summarily reversing the decision of the Second Circuit.

I. THE SECOND CIRCUIT IS IN CONFLICT WITH OTHER CIRCUITS ON THE NATURE OF FOREIGN SOVEREIGN IMMUNITY AND THE AVAILABILITY OF INTERLOCUTORY REVIEW.

The Second Circuit failed to recognize that the immunity granted to foreign sovereigns under the Foreign Sovereign Immunities Act is immunity from the jurisdiction of U.S.

---

[4] In both its ruling and its denial of rehearing, the Second Circuit ignored the Air Force's alternative request for mandamus relief.

courts, *i.e.*, that sovereign immunity is not merely immunity from judgment but also immunity from suit. The Second Circuit's contrary ruling on that point led to the equally erroneous conclusion that a foreign sovereign-in this case, the Bolivian Air Force—has no right to interlocutory review of a denial of immunity. Both rulings conflict with the decisions of every other circuit to address these issues. Because of the importance of these issues—and to resolve these conflicts—this Court should grant certiorari.

A. Foreign Sovereign Immunity Is Immunity From Suit.

The Second Circuit made the threshold mistake of treating the Bolivian Air Force no differently than it would an ordinary private litigant. In fact, the Air Force is a "foreign state" within the meaning of 28 U.S.C. § 1603. See *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151-53 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995). As a result, Transaero can only overcome the Air Force's claim of immunity by complying with the requisite service of process provisions in the Foreign Sovereign Immunities Act. See 28 U.S.C. § 1608(a). Transaero failed to comply with those provisions when it served the Air Force with its Complaint. Accordingly, the District Court did not have subject matter jurisdiction over the Air Force *ab initio*.

The Foreign Sovereign Immunities Act "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The language of the statute, in turn, is crystal clear: "a foreign state *shall be immune from the jurisdiction of the courts of the United States* . . . except as provided." 28 U.S.C. § 1604 (emphasis added); see also 28 U.S.C. §§ 1602, 1605. This Court has made clear that the language of the statute means exactly what it says: "Under the Act, a foreign state is

presumptively immune from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (emphasis added); see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) (the Act "comprehensively regulat[es] the *amenability* of foreign nations to suit in the United States") (emphasis added).

For that reason, "[a]t the threshold of every action in a district court against a foreign state," the court must make an affirmative determination that it has personal and subject-matter jurisdiction. *Id.* at 493-94.

With the conspicuous exception of the Second Circuit in this case, every Circuit that has addressed the issue agrees that foreign sovereign immunity "is an immunity from suit rather than a mere defense to liability; it is effectively lost if a case is erroneously permitted to go to trial." *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988).[5] The Second Cir-

---

[5] See *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) ("'sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits'"); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1281 (3d Cir. 1993) ("we adopt the prevalent view that sovereign immunity is an immunity from trial and the attendant burdens of litigation on the merits, and not just a defense to liability on the merits"), *cert. denied*, 114 S. Ct. 2101 (1994); *Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385 (5th Cir. 1991) ("the FSIA 'is an immunity from suit rather than a mere defense to liability; it is effectively lost if a case is erroneously permitted to go to trial'"); *Gould Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988) ("sovereign immunity is immunity from suit, not just from liability"); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) ("'sovereign immunity in modern international law . . . promote[s] the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based upon its public acts'") (quoting testimony of the State Department Legal Advisor). See also *The*

cuit's contrary decision—unlimited by any qualifying or distinguishing language—raises the possibility of other circuits following its lead, thereby throwing the law of foreign sovereign immunity into even greater turmoil.

The Second Circuit based its holding that foreign sovereign immunity consists only of the right "not to be subject to a binding judgment," 99 F.3d at 541; App. 7a, on this Court's decision in *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988). But the petitioner in *Van Cauwenberghe* was a private person, a Belgian real estate broker accused of fraud who asserted an immunity from service of process under the doctrine of specialty. *Id.* at 525. This Court held that he had no immunity from suit, and that his rights could be vindicated on an appeal after final judgment. *Id.* at 525-26. In so doing, however, this Court distinguished between two kinds of immunity—"a right not to stand trial" at all, and a right to prevail at trial. *Id.* at 524. Van Cauwenberghe asserted the second kind of immunity, while the Bolivian Air Force is entitled to the first by statute.

That is how the Seventh Circuit interpreted *Van Cauwenberghe* in *Pullman Construction Industries, Inc. v. United States*, 23 F.3d 1166, 1169 (7th Cir. 1994). In fact, the Seventh Circuit explicitly cited the Foreign Sovereign Immunities Act as an example of immunity from suit. See *id.* ("The eleventh amendment and the FSIA create genuine rights not to be sued in federal court."). The Second Circuit's reading of *Van Cauwenberghe* thus creates an additional conflict among the circuits over the meaning of that decision.

Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) (sovereigns are equal entities under international law and have no authority over one another).

The Bolivian Air Force asked the District Court to vacate the default judgment, based on the assumption that the D.C. Circuit's opinion was binding with respect to the jurisdictional issues that it decided. The denial of that motion is not only a refusal to accord the proper *res judicata* effect to the decision of a U.S. Court of Appeals; it is also—at its very core—a denial of the Air Force's claim that it is not amenable to suit under the Act and a finding that U.S. courts have jurisdiction over the Bolivian Air Force *whether or not* Transaero complied with the requirements of the Act. The District Court's assertion of jurisdiction—in the face of the D.C. Circuit's finding to the contrary—denies to the Bolivian Air Force the immunity from suit that is guaranteed to it by the Foreign Sovereign Immunities Act.

B. A Foreign Sovereign Is Entitled To Interlocutory Review When A District Court Denies Its Claim Of Immunity.

The District Court's disregard for the D.C. Circuit's ruling and its assertion of jurisdiction over the Bolivian Air Force were simple, clear-cut errors of law, and the Air Force noticed an interlocutory appeal seeking a review and correction of that decision. But the Second Circuit compounded the error by ruling that the District Court's assertion of jurisdiction over a foreign sovereign is not an appealable interlocutory order. The Second Circuit rested its ruling on the assertion that the immunity of foreign sovereigns "may be effectively vindicated following final judgment." 99 F.3d at 541; App. 7a.

The Second Circuit's decision to deny a foreign sovereign an interlocutory review on this issue conflicts with every other circuit to consider the issue. Prior to the Second Circuit's decision, there was unanimity that threshold determinations of jurisdiction—that is, whether a foreign sovereign is immune from suit—are immediately subject to

interlocutory appeal.[6] The D.C. Circuit reached the same conclusion in this very case. See *Transaero*, 30 F.3d at 149-150. Although this Court has never ruled on the issue explicitly, it has heard at least one foreign sovereign immunity case on interlocutory review. See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

It is not just in the context of foreign sovereigns that denials of immunity from suit are subject to interlocutory review. Denials of Eleventh Amendment immunity are also subject to interlocutory review. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). So, too, are denials of individual officials' claims of absolute and qualified immunity, see *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), both after a motion to dismiss and after summary judgment, see *Behrens v. Pelletier*, 116 S. Ct. 834 (1996). The Second Circuit's decision flies in the face of these precedents as well. In fact, this case is almost indistinguishable from *Metcalf & Eddy*; in both cases, the Court of Appeals denied interlocutory review of immunity claims and created a conflict with every other circuit to address the issue. This Court should apply *Metcalf & Eddy* and summarily reverse the Second Circuit.

---

[6] See *Foremost-McKesson*, 905 F.2d at 439, 443 (D.C. Cir. 1990); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 814 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 532 (5th Cir. 1992) ("the interlocutory denial of a claim of foreign sovereign immunity is appealable under the collateral order doctrine"), *cert. denied*, 506 U.S. 956 (1992); *Stena Rederi AB*, 923 F.2d at 384 (5th Cir. 1991); *Gould Inc.*, 853 F.2d at 450-51 (6th Cir. 1988); *Segni*, 816 F.2d at 347 (7th Cir. 1987) ("A foreign government should not be put to the expense of defending [a] lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity."); *Compania Mexicana de Aviacion*, 859 F.2d at 1356 (9th Cir. 1988).

Even if this were an open issue, an independent application of the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), would demonstrate that the Courts of Appeals have appellate jurisdiction over a district court's denial of foreign sovereign immunity. As this Court has said:

> To fall within the [Cohen] exception an order must satisfy three conditions: It must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment."

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). All three criteria are satisfied here.

First, the Order conclusively determines a disputed question. By denying the Bolivian Air Force's motion, the District Court, in effect, barred it from asserting the immunity from suit codified in the Foreign Sovereign Immunities Act. That determination is conclusive because the necessary result of that court's ruling is to require the Air Force to defend itself in court—thus ending the Air Force's immunity. See *Metcalf & Eddy, Inc.*, 506 U.S. at 145 (denials of immunity from suit "purport to be conclusive determinations").

Second, the Order effectively resolves an important issue —whether the Bolivian Air Force is amenable to suit under the Act—that is completely separate from the merits of the action. This issue has nothing to do with the Air Force's liability, if any, on the merits. See *id.*

Third, the District Court's denial of the Bolivian Air Force's immunity is effectively unreviewable on appeal from a final judgment. Contrary to the Second Circuit's assertion,

it is not just the question of the Air Force's "right not to be subject to a binding judgment," 99 F.3d at 541; App. 7a, that is at stake; it is the Air Force's right under federal and international law not to be sued at all. See pp. 8-11, *supra*.

The District Court's Order allows the lawsuit against the Air Force to go forward and forces the Air Force to defend itself in a court that has no personal or subject matter jurisdiction over it. That result is "effectively unreviewable on appeal." See *Metcalf & Eddy, Inc.*, 506 U.S. at 145 (immunity from suit "is for the most part lost as litigation proceeds past motion practice"). By the time the District Court enters its "final order" in this matter, the immunity from suit that was guaranteed to the Air Force by international law and by the Foreign Sovereign Immunities Act, and that was recognized by the D.C. Circuit, will have been shattered. See *Bryant v. Sylvester*, 57 F.3d 308, 316 (3d Cir. 1995) ("failure to afford immediate appeal" renders asserted immunity "worthless"), *vacated on other grounds*, 116 S. Ct. 899 (1996); *Federal Ins. Co.*, 12 F.3d at 1282 ("providing review only after trial would destroy the legal and practical value of [defendants' foreign] sovereign immunity defense"); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("the risk of harm from having to defend the lawsuit remains constant and is an irreparable loss"); *McSurely v. McClellan*, 697 F.2d 309, 317 & n.13 (D.C. Cir. 1982) (compelling defendant to litigate before denial of immunity claim is reviewed on appeal is an "irretrievable loss of immunity from suit"). No court will be able to restore the Air Force's immunity.[7]

---

[7] The Second Circuit's reliance on *Richardson-Merrell*, 472 U.S. 424, see 99 F.3d at 541; App. 7a—a suit entirely between private parties with no claim of immunity of any kind—completely misses the point. It is not the mere expense of litigation of which the Bolivian Air Force complains. It is the irrevocable denial of its immunity from suit that is at issue. The

In sum, a district court's denial of foreign sovereign immunity meets the requirements of the collateral order doctrine. The Second Circuit's refusal to hear the Bolivian Air Force's appeal on this issue creates a needless and harmful conflict with the decisions of other circuits and raises the possibility of further applications of this misguided holding, both in the Second Circuit and in the other circuits that have yet to address the issue.

II. THE SECOND CIRCUIT HAS UNDERMINED THE UNIFORMITY OF FEDERAL LAW THAT WAS THE EXPRESS PURPOSE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT.

Congress enacted the Foreign Sovereign Immunities Act with the express purpose of creating a uniform body of federal law on the substantive and procedural issues relating to foreign sovereign immunity. The Second Circuit's ruling undercuts that uniformity by creating conflict among the circuits, and raises the possibility that other circuits that have not addressed these issues will follow suit or will craft their own rules, further undermining the purpose of the Act.

This Court has recognized that Congress passed the Act to "reduc[e] the potential for a multiplicity of conflicting results" on issues relating to foreign sovereign immunity. *Verlinden B.V.*, 461 U.S. at 497. The legislative history evidences this concern on the part of Congress. Thus, the House report on the Act declares that "broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487 at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611; see

---

Air Force has a right not to be subject to any further delay or expense in the vindication of its immunity.

also *id.* at 32, 1976 U.S.C.C.A.N. at 6631. Numerous lower courts also have recognized uniformity of decision as a chief purpose of the Foreign Sovereign Immunities Act. As the Third Circuit has observed,

> enactment of the FSIA was in response to unique policy considerations touching on the international relations of the United States [such as] Congress' deliberate intent to circumvent much of the potential for interference with the federal government's foreign relations caused by lack of uniformity and local bias in civil caselaw . . . .

In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation, 15 F.3d 1230, 1239 (3d Cir. 1994).[8]

The Second Circuit appears to have been unaware of Congress' desire for uniformity in the application of the Foreign Sovereign Immunities Act. Certainly, its decision has the result of undermining this purpose. This Court should grant certiorari, summarily reverse the Second Circuit, and thereby restore uniformity to the law of foreign sovereign immunity.

---

[8] See also *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1259 (11th Cir. 1992); *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 937 (7th Cir. 1996) ("Congress sought to promote uniformity in cases involving foreign governments"); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420 (5th Cir. 1982) (Wisdom, J.) ("Congress chose to treat jurisdiction of actions against foreign sovereigns in a uniform and comprehensive manner."); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 879 (4th Cir. 1981) ("Both the statutory language and the legislative history evince the congressional desire to achieve uniformity of decisional law in the area of suits against foreign sovereigns."), *cert. denied*, 455 U.S. 982 (1982); 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3662, at 394 (2d ed. 1985) (Congress intended to create uniformity of decision in actions involving foreign governments).

III. THE SECOND CIRCUIT'S DECISION CREATES UNCERTAINTY FOR FOREIGN SOVEREIGNS AND THUS HAS SIGNIFICANT FOREIGN POLICY IMPLICATIONS.

The Second Circuit's decision subjects the Bolivian Air Force—which has been found by the District of Columbia Circuit to be a foreign sovereign—to the jurisdiction of U.S. courts in violation of the Foreign Sovereign Immunities Act, and further allows the imposition on that sovereign of an exorbitant money judgment to which the Air Force has substantial defenses that it had no opportunity to raise.

But the damage from the Second Circuit's ruling goes beyond the harm that it will cause to the Republic of Bolivia. As we have said, the issue for this Court is not whether the Bolivian Air Force's claim of immunity is valid. Rather, the issue is how the federal courts will treat a claim of immunity by a foreign sovereign after a district court decides that such a claim is invalid. Whether a foreign sovereign's immunity should be erased before an appeals court can review and, if necessary, correct the district court's decision is a question with profound implications for the power of federal courts over foreign sovereigns.

For example, if the Second Circuit's decision is allowed to stand, a plaintiff's choice of forum could be the determinant of a foreign sovereign's amenability to suit. Such a result would create uncertainty for foreign sovereigns as to the nature and extent of their immunity in U.S. courts, an uncertainty that itself has substantial foreign policy implications.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted and the decision of the Second Circuit should be summarily reversed.

Respectfully submitted,

GREGORY B. CRAIG
(Counsel of Record)
JOHN T. PARRY

WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Petitioner
La Fuerza Aerea Boliviana

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1501—August Term 1995

Argued: April 26, 1996 Decided: Nov. 6, 1996

Docket No. 95-7855

TRANSAERO, INC.

Plaintiff-Appellee,

v.

LA FUERZA AEREA BOLIVIANA, an
Instrumentality of the Republic of Bolivia,
a Foreign State,

Defendant-Appellant.

Before: VAN GRAAFEILAND, *Circuit Judge*,* and
CARTER, *District Judge*.**

---

* The Honorable J. Daniel Mahoney, who was a member of the panel, died on October 23, 1996, and the appeal is being decided by the remaining two members of the panel, who are in agreement. See Local Rule § 0.14(b).

** The Honorable Robert L. Carter, United States District Judge for the Southern District of New York, sitting by designation.

VAN GRAAFEILAND, *Circuit Judge*:

Fuerza Aerea Boliviana ("BAF") appeals from an order of the United States District Court for the Eastern District of New York (Mishler, J.) denying its motion to vacate a default judgement in favor of Transaero, Inc. We dismiss the appeal for lack of appellate jurisdiction without prejudice to BAF's right to appeal from the final judgement when entered.

This action arises out of a credit agreement between BAF and Transaero entered into in May 1981. The agreement established an open account upon which BAF could purchase aviation equipment from Transaero. The agreement also provided that BAF would pay interest at 1.75% per month (21% per annum) on all purchases not paid within 120 days of shipment. Between 1981 and 1982 BAF's purchases resulted in a principal balance of $598,115.76 on the account. Although BAF paid $648,115.76 on the debt during the next four years, Transaero sued on September 8, 1988 to recover $983,696.60 allegedly owed to it for outstanding principal and interest.

BAF failed to answer the complaint or to appear at a scheduled default judgment hearing, and on April 28, 1989 the district court entered a default judgment in the amount requested. In 1991 Transaero registered and sought to enforce the judgment in the United States District Court for the District of Columbia. BAF appeared in the action and sought summary judgment opposing enforcement, arguing that there had been improper service of process in the Eastern District under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.). The court denied the motion on September 25, 1992. BAF appealed to the United States Court of Appeals for the District of Columbia Circuit.

While the appeal was pending, BAF moved under Rule 60(b) in the Eastern District to vacate the default judgement. Although BAF's principal argument was that the default judgement had been procured by fraud, its motion papers contained the following proposed reservation of issues:

> The Air Force [BAF] has appealed Judge Revercomb's opinion [to the D.C. Circuit]. See Exh. 19 (notice of appeal). The Air Force acknowledges that until overturned on its pending appeal, Judge Revercomb's opinion bars the Air Force from challenging the propriety of service under the [FSIA]. See *Huron Corp. v. Lincoln Co.*, 312 U.S. 183, 188-89 (1941) (judgment on appeal is still final judgement); *Petrella v. Siegel*, 843 F.2d 87, 90 (2d Cir. 1988) (judgment pending appeal entitled to res judicata effect); *United States v. NYSCO Laboratories, Inc.*, 318 F.2d 817 (2d Cir. 1963) (same). Although barred by res judicata from contesting it, the Air Force in no way waives these issues. In this, its first responsive pleading, the Air Force preserves its challenges to Transaero's improper service of process and this Court's lack of personal and subject-matter jurisdiction under the [FSIA] and the United States Constitution.

On August 12, 1993, the Eastern District denied BAF's motion to vacate the judgement and BAF then appealed to this Court. In *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir. 1994) ("*Transaero I*"), we upheld the Eastern District's decision, finding no abuse of discretion in the denial of BAF's claim of fraud on the court. Noting Transaero's failure to address BAF's claims regarding the district court's calculation of interest, we held that there remained two questions regarding "the accuracy of the interest calculation on which the award to Transaero was based."

Id. at 462-63. Accordingly, we remanded to the district court for consideration of the proper starting date for the running of interest and the correct interest rate to be used. BAF filed a Petition for Rehearing and asked among other things that this Court "hold its remand in abeyance, and thereby stay the mandate until the D.C. Circuit decided the pending appeal." BAF also raised a question regarding the termination of the accrual of interest under the contract.

While BAF's petition was pending, the Court of Appeals for the District of Columbia Circuit handed down a decision reversing Judge Revercomb. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994) ("*Transaero II*"), *cert. denied*, 115 S. Ct. 1101 (1995). The Court of Appeals held that the Eastern District lacked personal jurisdiction over BAF under the FSIA because, although service of the complaint complied with the FSIA provision for serving an agency or instrumentality of a foreign state (28 U.S.C. § 1608(b)), BAF was an alter ego of a foreign state and service upon it had to comply with the more stringent requirement of 28 U.S.C. § 1608(a). The Court therefore concluded that the entry of default judgement in the Eastern District was "void and unenforceable." *Id.* at 154. Transaero filed a Petition for Rehearing, a Suggestion for Rehearing In Banc, and a Petition for a Writ of Certiorari, all of which were denied.

After Transaero II, this Court sua sponte requested the parties to brief the issue of the preclusive effect of the D.C. Circuit's holding. With the parties' added wisdom in hand, we decided that

> whatever preclusive effect that decision [*Transaero II*] might have on issues that are open for decision in any court, it is not a circumstance requiring us to grant BAF's petition for rehearing. That petition afforded BAF an opportunity to indicate "the points

> of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." Fed. R. App. P. 40(a) . . . . [W]e have now pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any, may operate.

Transaero, Inc. v. La Fuerza Aerea Boliviana, 38 F.3d 648, 650 (2d Cir. 1994) ("*Transaero III*"). We stated, however, that we were ruling "without expressing any views as to . . . the validity of Transaero's service upon BAF in initiating the Eastern District suit . . . [or] whether BAF is entitled to pursue a new Rule 60(b) motion in the Eastern District, now that the D.C. Circuit has declared the default judgment to be void." *Id.* All we did was broaden the remand to allow the district court to consider the proper ending date for the assessment of interest.

Following the case's return to the district court, BAF brought the Rule 60(b)(4) motion which led to this appeal, asserting that the default judgement was void for lack of proper service and that the ruling of the Court of Appeals for the District of Columbia Circuit was res judicata. The district court denied the motion and ordered that expedited discovery begin in preparation for a hearing to determine the interest rate and interest period to be used in calculating the award. BAF appealed and we granted a stay of the proceedings in the district court.

"Determinations of liability that leave unresolved questions of remedy ordinarily are not final. . . . The need to resolve a dispute and not routine question of interest . . . defeats finality." 15B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3915.2 at 271-74. Although a final decision may be entered if only "ministerial proceedings" remain, *id.* at 271, this is a narrow exception reserved for the case where an award can be executed after a simple arithmetic calculation or where there remains only some

other mechanical task to be performed. In the instant case, however, the appropriate interest rate and the interest period remain as disputed issues. The district court still must determine the proper period during which to assess interest and has ordered discovery in order to obtain Transaero's records of BAF's account for this purpose. Moreover, it is an open question whether Transaero is entitled to compound interest under the contract and applicable law. Because the district court has yet to rule on these issues, there has been no final judgment.

By its own terms, Rule 60(b) applies only to judgments that are final. Although a district court is vested with the power to revisit its decisions before the entry of final judgment and is free from the constraints of Rule 60 in so doing, see *Cohn v. United States*, 259 F.2d 371, 376 (6th Cir. 1958), the denial of a motion to effect such a reconsideration is immediately appealable only if the determination at issue falls within one of the narrow exceptions to the final judgment rule. The collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), is one of those exceptions, and BAF contends that it supports our appellate jurisdiction in the instant case. In Cohen, the Supreme Court stated that although most trial court decisions can be reviewed effectively on appeal from the final judgment, certain rights may be irreparably lost if immediate appeal is not permitted. *Id.* at 546. One such right is the right of immunity, i.e., the right not to be sued at all. See *Imbler v. Pachtman*, 424 U.S. 409, 417-20 (1976). BAF attempts to bring the instant case within the ambit of this immunity defense by arguing that "federal courts have appellate jurisdiction to hear an interlocutory appeal involving a foreign sovereign's amenability to suit—including questions of personal jurisdiction . . ." Appellant's Reply Brief at 3-4. This attempt must fall. "[T]o fall within the Cohen exception, an order must satisfy at least three conditions: It must

conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989) (internal quotation marks omitted). Because BAF's right not to be subject to a binding judgment may be effectively vindicated following final judgment, the denial of the claim of lack of jurisdiction is not an immediately appealable collateral order. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988).

It is unfortunate that dismissal of the appeal will cause additional delay and expense which eventually may prove to have been unnecessary. However, "the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436 (1985).

The appeal is dismissed without prejudice to BAF's right to appeal from the final judgment when entered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of January one thousand nine hundred and ninety-seven.

Dkt No: 95-7855

TRANSAERO, INC.

Appellee

v.

LA FUERZA AEREA BOLIVIANA,

Appellant

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant La Fuerza Aerea.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal

and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
George Lange III, Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR,
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No: 88-2788

August 4, 1995

TRANSAERO, INC.

Plaintiff,

-against-

LA FUERZA AEREA BOLIVIANA,
an instrumentality of the
REPUBLIC OF BOLIVIA, a Foreign State,

Defendant.

MEMORANDUM OF DECISION AND ORDER

MISCHLER, District Judge

Defendant, La Fuerza Aera Boliviana ("the Air Force"), moves pursuant to Fed.R.Civ.P. 60(b)(4) to set aside the default judgment entered on April 28, 1989 and to dismiss the complaint solely because of the preclusive effect of the District of Columbia Circuit Court of Appeals' finding that this Court lacked personal jurisdiction. See *Transaero, Inc. v. La Fuerza Aera Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1101 (1995). Defendant also moves to stay all non-jurisdictional proceedings, pending the resolution of the motion to set aside the

default judgment. Plaintiff, Transaero, Inc. ("Transaero"), moves to modify the default judgment pursuant to the mandate issued by the Second Circuit Court of Appeals on March 27, 1995. See *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457 (2d Cir.), *reh'g. granted in part*, 38 F.3d 648 (2d Cir. 1994).

BACKGROUND

This case has a lengthy history and comes before us now in an unusual procedural context. Familiarity with this Court's Memoranda of Decision and Orders dated April 21, 1989 and August 12, 1993, the Second Circuit decisions *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457 (2d Cir. 1994) ("*Transaero I*") and *Transaero, Inc. v. La Fuerza Area Boliviana*, 38 F.3d 648 (2d Cir. 1994) ("*Transaero III*"), as well as the District of Columbia Circuit Court of Appeals decision *Transaero, Inc. v. La Fuerza Aereo Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 1101 (1995) ("*Transaero II*"), is assumed. However, due to the complicated nature of this case we will briefly recite the pertinent facts and procedural posture.

This case originally arose out of an alleged breach of a credit agreement entered into between Transaero, a supplier of aircraft parts, and the Air Force in May 1981. The credit agreement created an open account upon which the Air Force could make purchases from Transaero. The agreement required the Air Force to pay interest of 1 3/4% per month (21% per annum) on all purchases not paid within 120 days of shipment. From June 22, 1981 until April 14, 1982, the Air Force ordered and accepted delivery of certain aviation equipment and thereby accumulated a principal balance of $598,115.76.

On or about September 8, 1988 Transaero filed a verified complaint seeking $983,696.60 in damages from the Air Force for: (1) "goods sold and delivered and accrued inter-

est on the unpaid balance"; (2) "an account stated"; (3) "breach of the Finance Agreement"; (4) "interest accruing on the unpaid balance of $598,115.76 for 86 months". The Air Force failed to serve or file an answer or enter an appearance.

Subsequently, Transaero moved for a default judgement. On March 30, 1989, we held a hearing on Transaero's motion for a default judgment. Despite receiving adequate notice, the Air Force failed to appear. In a Memorandum of Decision and Order dated April 21, 1989, we granted Transaero's motion for default judgment finding that: (1) the summons and complaint were properly served upon the Air Force in accordance with 28 U.S.C. § 2608(b)(3)(B); (2) the Air Force had adequate notice of the hearing, but failed to enter an appearance; (3) the complaint stated a cause of action based on breach of contract for the Air Force's failure to pay amounts due and owing for the purchase and delivery of aviation equipment; (4) the Air Force was not entitled to Sovereign Immunity under the foreign Sovereign Immunities Act (FSIA) because the activity of purchasing aviation equipment fell under the purview of the "commercial activities" exception to the FSIA, 28 U.S.C. § 1605(a)(2); and (5) Transaero's claim was supported by the proof submitted. The Clerk of the court entered the default judgment on April 28, 1989.

In 1991, Transaero, in order to enforce the judgment, registered the default judgment in the district court for the District of Columbia under 28 U.S.C. § 1963 (Supp. IV 1992) and served a set of interrogatories under Fed.R.Civ.P. 69. The Air Force entered an appearance and collaterally attacked this Court's default judgment, arguing that the rendering court lacked personal jurisdiction. Specifically, they sought summary judgment to quash the interrogatories and dismiss the proceedings on the ground that the Air Force

had not been served in compliance with § 1608(a) of the FSIA.

The late Judge Revercomb of the District Court for the District of Columbia denied the summary judgment motion in an order dated September 25, 1992. In that order, the court found: (1) that the Air Force was served pursuant to § 1608(b) of the FSIA; (2) that the Air Force received actual notice of the lawsuit; and (3) that the Air Force was notified by mail of this Court's hearing on Transaero's motion for default judgment. Judge Revercomb then held, as a matter of law, agreeing with this Court, that the Air Force was an "agency or instrumentality" of the Republic of Bolivia and, thus, that service under § 1608(b) of the FSIA was proper. The Air Force then immediately appealed the interlocutory ruling by Judge Revercomb to the District of Columbia Circuit Court of Appeals. See *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C.Cir. 1991) (denial of claim of sovereign immunity subject to interlocutory appeal under ambit of "collateral order doctrine").

While the D.C. Circuit appeal was pending, the Air Force's new counsel, Williams & Connolly, entered an appearance in the Eastern District of New York, on May 10, 1993, and filed a Fed.R.Civ.P. 60(b) motion to set aside the default judgment. The Air Force argued to vacate the default judgement because the sworn affidavit executed by Transaero's counsel allegedly contained numerous misrepresentations of law and fact which constituted a fraud upon this Court. The Air Force also challenged the subject matter jurisdiction of this Court to enter the default judgment. We denied the Rule 60(b) motion on August 12, 1993 and the Air Force appealed that ruling to the Second Circuit.

On May 19, 1994 the Second Circuit affirmed our denial of the rule 60(b) motion. *Transaero I*, 24 F.3d 457 (2d Cir. 1994). The Second Circuit rejected the claim of fraud on

the court and the claim of lack of subject matter jurisdiction, holding that this Court did not abuse its discretion in denying the Air Force's application to set aside the default judgment under Rule 60(b) and remanded for the limited purpose of re-examining the mathematical accuracy of the award to Transaero.

On July 6, 1994, the Air Force filed a petition for rehearing with the Second Circuit. The petition primarily contended that the remand should include the consideration of the proper ending date for the running of interest. The Air Force also urged that the Second Circuit stay their mandate until the jurisdictional challenges have been adjudicated in the D.C. Circuit.

On July 29, 1994, while the petition for rehearing was pending in the Second Circuit, the D.C. Circuit decided the appeal from Judge Revercomb's ruling and reversed. *Transaero II*, 30 F.3d 148 (D.C. Cir. 1994). By a divided vote, the D.C. Circuit ruled that the air Force is a "foreign state" rather than an "agency or instrumentality of a foreign state" for purposes of service of process under the FSIA. Thus, although service may have been sufficient under § 1608(b), applicable to service on an agency or instrumentality of a foreign state, the D.C. Circuit ruled that service was not properly accomplished pursuant § 1608(a), applicable to service on a foreign state. The court concluded that the "Eastern District of New York lacked personal jurisdiction, and the default judgment registered in the District of Columbia was therefore void and unenforceable." *Id.* at 154. The Court then reversed and remanded with directions to dismiss the proceedings. A petition for rehearing with a suggestion for rehearing in banc was denied on September 15, 1994.

The Second Circuit, in light of the D.C. Circuit's decision and as part of the petition for rehearing, "then invited the parties' views as to whether the default judgment should

now be vacated." *Transaero III*, 38 F.3d at 650. On October 19, 1994 the Second Circuit denied the petition for rehearing on those grounds. After noting that the parties seemed to have flip-flopped their respective positions on the preclusive effect of the action in the District of Columbia, the Second Circuit ruled that "whatever preclusive effect the decision might have on issues that are open for decision in any court, it is not a circumstance requiring us to grant [the Air Force's] petition for rehearing." *Id.* They further explained that there was then "pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any may operate." *Id.* They did, however, grant the petition for the limited purpose of broadening the remand to include consideration of the cessation of interest. The mandate was stayed until March 27, 1995.

DISCUSSION

We are now in the peculiar procedural posture whereby the District of Columbia Circuit Court of Appeals, in a collateral attack, has held that this Court lacked personal jurisdiction and decided that the default judgment registered in the District of Columbia was void and unenforceable, while the Second Circuit, in a direct attack, has affirmed the default judgment and remanded for the limited purpose of assessing the mathematical accuracy of the default award. Judge Mikva astutely noted in his dissent in *Transaero II* that "we [the D.C. Circuit] tell the parties that the statute compels one result; federal courts in another jurisdiction [the Second Circuit] tell the same parties that the statute compels the opposite result. Between us, we have thoroughly muddled the law." *Transaero II*, 30 F.3d at 155 (dissent).

As would be expected, the Air Force contends that we are bound by what they deem to be a successful collateral challenge to the personal jurisdiction of this Court over the defendant in the default proceeding. They assert that the

D.C. Circuit's ruling that the Eastern District of New York lacked personal jurisdiction is *res judicata* on the issue and we must abide by it. Transaero, on the other hand, argues that we are bound by the Second Circuit mandate remanding the case for the limited purpose of deciding the mathematical accuracy of the default award. We now attempt to "unmuddle" the law.

THE AIR FORCE'S RULE 60(B) MOTION

Based on the D.C. Circuit decision the Air Force now moves pursuant to Fed. R. Civ. P. 60(b)(4) to set aside the default judgment as void. Subsection four of Rule 60(b) is unique because relief is not discretionary if the judgment is void and a meritorious defense is not necessary. *Covington Industries, Inc. v. Resintex A.G.*, 629 F.2d 730, 733 n.3 (2d Cir. 1980). Thus, the only issue to decide is whether this Court's default judgment is void in light of the D.C. Circuit's decision. The Air Force argues that the D.C. Circuit's holding that the 1989 default judgment "registered in the District of Columbia was therefore void and unenforceable," *Transaero II*, 30 F.3d at 154, is owed preclusive effect in this Court and dictates that the complaint be dismissed. the Air Force further asserts that "[t]he only possible basis for refusing to give preclusive effect to the District of Columbia Circuit's judgment is that it lacked jurisdiction to decide the issue in the first place." Memorandum of Law in Support of Motion to Set Aside Judgment and Dismiss the Complaint at 7.

The issue then is whether the Air Force's Notice of Appearance in the Eastern District of New York, Rule 60(b) motion, appeal to the Second Circuit and petition for rehearing constituted an appearance which waived any objection to personal jurisdiction and barred any collateral attack. As discussed below, we find that the aforementioned actions taken by the Air Force constitute such an appearance.

Waiver of Personal Jurisdiction

The requirement of personal jurisdiction represents an individual right and therefore may be waived. *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 703, 102 S.Ct. 2099, 2105 (1982). "A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." *Id.* at 703, 102 S.Ct. at 2105. A defendant's actions may amount to a legal submission to the jurisdiction of the court, whether voluntary or not. *Id.* at 704-05, 102 S.Ct. at 2105.

The issue of waiver of personal jurisdiction is generally governed by Rule 12 of the Federal Rules of civil Procedure. Rule 12(b) states, in pertinent part, as follows:

> Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto is one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person, . . . (4) insufficiency of process, (5) insufficiency of service of process . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted . . . .

Fed.R.Civ.P. 12(b). "Under Rule 12(h)(1), if one of these defenses is not promptly asserted by motion or in the responsive pleading, it is waived." *Santos v. State Farm Fire and Cas. Co.*, 902 F.2d 1092 (2d Cir. 1990). Rule 12(h)(1) states, in pertinent part, that "[a] defense of lack of jurisdiction over the person . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment made thereof

permitted by Rule 15(a) to be made as a matter of course." Fed.R.Civ.P. 12(h)(1).

"Thus, the message conveyed by the present version of Rule 12(h)(1) seems quite clear. It advises a litigant to exercise great diligence in challenging personal jurisdiction, venue, or service of process. If he wishes to raise any of these defenses he must do so at the time he makes his first significant defensive move—whether it be by way of a Rule 12 motion or a responsive pleading." Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1391, at 752 (footnote omitted).

As noted above, after the final entry of default judgment issued by this Court, the Air Force filed a notice of appearance in the Eastern District of New York and a Fed.R.Civ. P. 60(b) motion attacking the default judgment. This court denied the motion and the Air Force appealed the decision to the Second Circuit. At no time during these appearances did the Air Force object to the lack of personal jurisdiction.

The Air Force's Rule 60(b) motion to vacate the default judgment was its first significant defensive move. The failure to object to lack of personal jurisdiction or insufficient service of process resulted in the waiver of the objection. The conduct relied upon to find waiver can occur after entry of default. See *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 733 (7th Cir. 1991). Several courts have found that a post-default judgment motion should be treated as an initial rule 12 motion to dismiss for purposes of waiver under Rule 12(h)(1). See *Lowery*, 924 F.2d at 733 (citing *J. Slotnick Co. v. Clemco Industries*, 127 F.R.D. 435, 440-41 (D.Mass. 1989) (failure to raise challenge to service in first defensive move after entry of default results in waiver of that defense under Rule 12(h)(1)); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 405 (7th Cir. 1986) (objection to service of process waived for

not asserting it in first Rule 60(b) motion to vacate default judgment for lack of personal jurisdiction); *O'Brien v. Sage Group, Inc.*, 141 F.R.D. 81, 83 (N.D.Ill. 1992), *aff'g.*, 998 F.2d 1394 (7th Cir. 1993) (defendant's abandonment of their objection to validity of service in their Rule 55(c) motion to vacate default judgment resulted in waiver of right to contest validity of service, and with it all objections to personal service); *Lichtenstein v. Jewelart, Inc.*, 95 F.R.D. 511, 513 (E.D.N.Y. 1982) (determination of a Rule 55(c) motion based on lack of jurisdiction over the defendant can and should be treated as initial motion to dismiss).

It is important to note that only after the Air Force's collateral attack was denied in the D.C. District Court, did the Air Force turn to this Court in the Eastern District of New York for relief on grounds other than personal jurisdiction and sufficiency of process. By appearing to contest the subject matter and to argue that there was a fraud on the court the air Force consented to the jurisdiction of this Court to hear the objections. It is axiomatic that a movant consents to personal jurisdiction, unless the movant is objecting to personal jurisdiction. Moreover, the air Force appealed the adverse ruling of this Court to the Second Circuit. The Air Force's action is consistent with consenting to the court's personal jurisdiction.

In other words, if we had granted the Rule 60(b) motion the Air Force could not then argue that this Court lacked the personal jurisdiction to hear the merits or if the Air Force had won its appeal, and the default judgment was vacated, the Air Force would have been deemed to have waived personal jurisdiction for the remand on the merits. Thus, the failure to object to lack of personal jurisdiction in the Rule 60(b) motion and in the appeal thereof resulted in a waiver of those objections. To hold otherwise would allow the defendant to assert jurisdictional and other objections at

different stages of litigation and would violate both the letter and spirit of Rule 12(h)(1).

Collateral Attack

There is no doubt that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. at 706, 102 S.Ct. at 2106 (citing *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517 (1931)); see also *Covington Industries, Inc. v. Resintex A.G.*, 629 F.2d 730, 732 (2d Cir. 1980); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987). This is true whether the judgment was issued by a tribunal within the enforcing court's jurisdiction or by a court of a foreign jurisdiction, unless barred by the principles of *res judicata*. See *Covington Industries*, 629 F.2d at 732 (citation omitted).

"On the other hand, if the defendant appears in the original action and contests the jurisdiction of the court over either the person or the subject matter . . . and that issue is decided against him, . . . the default judgement is not subject to collateral attack for lack of jurisdiction of either person or subject matter. Nor is it where he appears but fails to contest jurisdiction." *Moore's Federal Practice* ¶ 60.25[2], at 60-234 (emphasis added) (footnotes omitted); see *Baldwin*, 283 U.S. at 525, 51 S.Ct. at 518; see also *Moore's Federal Practice* ¶ 55.09, at 55-64.

Thus, a defendant faced with a lawsuit who believes the court lacks personal jurisdiction has basically two choices. the defendant can appear, challenge personal jurisdiction and defend the suit on the merits. This will preserve the jurisdictional objection for direct appeal. Or the defendant can remain entirely aloof from the original proceeding and attack the default judgment collaterally. However, if it is later

determined that the rendering court possessed proper jurisdiction, the defendant is foreclosed from arguing the merits. See discussion in Wright, Miller & Cooper, *Federal Practice and Procedure:* § 4430.

Originally, the Air Force strategically elected not to appear in the original proceeding in order to preserve its right to collaterally attack the default judgement. However, when the District of Columbia District Court denied the application, holding that there was personal jurisdiction in the Eastern District of New York, the Air Force shifted strategy. It entered an appearance and filed the Rule 60(b) motion. The Air Force was attempting to simultaneously attack the default judgment directly and collaterally.

However, the courts are in agreement that if the defendant appears and either loses a challenge or fails to make a challenge to the court's personal jurisdiction, a default judgment entered thereafter is res judicata on the issue of personal jurisdiction and the judgment is not subject to . . . collateral attack on that ground." *Moore's Federal Practice* ¶ 55.09, at 55-64 (footnotes omitted). This is due, in large measure, to the principle that a court has jurisdiction to determine its jurisdiction. See *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242 (1963); *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98 (1932) (filing motion to vacate in state court proceedings precluded federal collateral attack); *Baldwin*, 283 U.S. 522, 51 S.Ct. 517 (1931); see also Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3536.

A "court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377, 60 S.Ct. 317, 320 (1940) (citing *Stoll v. Gottlieb*, 305 U.S. 165, 161, 59 S.Ct. 134, 137 (1938)).

This is true even if the jurisdictional decision is erroneous. "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." *Stoll*, 305 U.S. at 172, 59 S.Ct. at 138.

The facts of the instant case are similar to those in *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98. In *American Surety Co. v. Baldwin*, a default judgment was issued by an Idaho State District court against a surety company which had given a supersedeas bond on an appeal to the Supreme court of Idaho. Three days after the entry of the judgment, the surety company filed a motion in that court to vacate and set aside the judgment. The Idaho district court granted the motion to vacate, but the supreme court of Idaho reversed the order vacating the judgment. *Id.* at 162, 53 S.Ct at 100. The surety company then petitioned for a rehearing. The petition was denied without opinion. *Id.* at 163, 53 S.Ct at 100.

The surety company then sought to collaterally attack the enforcement of the Idaho state judgement in federal court. The surety company asserted that since the judgment against it was entered without giving it notice and the opportunity of a hearing on the merits, the judgment was void under the due process clause of the Fourteenth Amendment. *Id.* at 162, 53 S.Ct. at 100. The Court held that the federal remedy was precluded by the proceedings taken in state court. The surety company "was at liberty to invoke the federal remedy without first pursuing that provided by state procedure. But an adequate state remedy was available; and, having invoked that and pursued it to final judgment, the surety company cannot escape the effect of the adjudication there." *Id.* at 164-65, 53 S.Ct at 101 (citations omitted).

See also *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134 (1938) (despite not appearing in initial action, Court reversed state collateral attack of federal bankruptcy judgment's jurisdiction because creditor moved to vacate federal judgment).

As the Court explained in *American Surety Co. v. Baldwin*, the Air Force had the opportunity to remain entirely aloof from the proceedings in the Eastern District of New York and then collaterally attack the default judgment in the District of Columbia on jurisdictional grounds. However, after facing defeat in the D.C. District Court, the Air Force made the deliberate move of entering the Eastern District of New York to challenge the default judgment directly. Having invoked the adequate remedy in the Eastern District, the Rule 60(b) motion to vacate, the Air Force is precluded from pursuing a collateral attack. *Id.*, 287 U.S. at 165, 53 S.Ct. at 101 (motion to vacate and the appeal from the order thereon were effective in conferring jurisdiction for the purpose of determining court's own jurisdiction). Further, it makes no difference that the Air Force instituted the collateral attack prior to making the Rule 60(b) motion to vacate. See *Stoll*, 305 U.S. 165, 59 S.Ct. 134.

A collateral attack on a default judgment is precluded if the party had the opportunity to raise a jurisdictional challenge, but failed to do so. *Chicot County Drainage*, 308 U.S. at 378, 60 S.Ct at 320. It is well settled that "[e]ven if a court does not expressly rule on matters relating to its exercise of jurisdiction, if the parties could have challenged the court's power to hear a case, then *res judicata* principles serve to bar them from later challenging it collaterally." *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986). This principle was reaffirmed in *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. at 702 n. 9, 102 S.Ct. at 2104 n.9 ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that

question in a collateral attack upon an adverse judgment. It has long been the rule that the principles of res judicata apply to jurisdictional determinations—both subject matter and personal.")

As discussed above, the Air Force waived any objection to personal jurisdiction when it filed its notice of appearance and motion to vacate. It had the opportunity to raise any objection to personal jurisdiction. In denying that application, this Court had determined its own jurisdiction. That decision, which was appealed and affirmed, precluded any collateral attack on jurisdiction. Otherwise, the Air Force would be entitled to more than one bite from the proverbial apple.

Res Judicata

The D.C. Circuit noted in its opinion that "[W]e do not consider whether the Eastern District's ruling might bar the Air Force's attack on personal jurisdiction, for Transaero did not assert any form of preclusion in the District Court for the District of Columbia, and we have generally refused to raise the question *sua sponte*." *Transaero II*, 30 F.2d at 150, n.1 (citations omitted).

However, Transaero could not have raised the issue in the D.C. District Court because at the time the Air Force was legitimately pursuing its collateral attack in the District of Columbia. In other words, at that time there was no ruling from the Eastern District. Only when the Air Force lost in the D.C. District Court did it file the Rule 60(b) motion in the Eastern District of New York. In this situation Professor Moore explains that "[i]n the case in which the judgment that constitutes the basis for a defense of res judicata is entered after judgment in parallel litigation and during the pendency of an appeal, its preclusive effect can be raised by a motion to affirm, or in the briefs." *Moore's Federal Practice* ¶ 0.408[1], at 112 (citing *Cotton States Mutual Insur-*

ance Co. v. Anderson, 749 F.2d 663, 665-66 (11th Cir. 1984) (preclusion issue not waived where it was presented on appeal)). Transaero did in fact argue in its brief, in a letter, and in its petition for rehearing to the D.C. Circuit that the Rule 60(b) proceedings in the Eastern District of New York were dispositive to the matters before the D.C. Circuit. See Combined Reply of Plaintiff Transaero, Inc., at 12-13, n.15 and Addendum B, at 8, n.15. Thus, the Air Force should have been precluded from continuing its collateral attack.

The last decision to be issued in this case was the Second Circuit decision granting the petition for rehearing "only to the limited extent of broadening the remand to include consideration of the cessation of interest . . . ." *Transaero III*, 38 F.3d at 650. "Every Court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter." *Stoll*, 305 U.S., at 171-72, 59 S.Ct. at 137 (citing *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29, 37 S.Ct. 492, 493 (1917)). The Second Circuit "declin[ed] to grant the petition for rehearing just because the D.C. Circuit has ruled that the default judgment is not enforceable in the District of Columbia." *Transaero III*, 38 F.3d at 650. The Second Circuit remanded the case for this Court to consider only the following three elements in determining the mathematical accuracy of the default award: (1) whether the interest started too early; (2) whether the interest rate exceeded the contract rate; and (3) the proper date for the cessation of interest. Thus, the Second Circuit's affirmation of the denial of the Rule 60(b) motion and its limited remand is preclusive on the issue of jurisdiction.[1]

---

[1] Even a third, independent, court would be bound by the Second Circuit decision since a court should give *res judicata* effect to the last previous judgment entered. This

THE AIR FORCE'S MOTION TO STAY NON-JURISDICTIONAL PROCEEDINGS

The Air Force has moved this Court for an order staying all non-jurisdictional proceedings, pending this Court's resolution of the Air Force's motion to vacate the default judgment. The motion is denied.

TRANSAERO'S MOTION TO MODIFY THE JUDGMENT

Transaero moves, pursuant to the mandate from the Second Circuit, for an order "(1) affirming the accuracy of the original calculation of damages upon which the April 28, 1989 Judgment of this Court was based and (2) retroactively increasing the April 28, 1989 Judgment in the amount of $185,014.32, said amount to retroactively accrue interest from that date at the statutory rate for judgments and the new judgment amount being $1,168,710.93 as of April 28, 1989."

The Air Force asserts that it needs discovery relevant to the remanded issue of determining the mathematical accuracy of the default award. We find that the Air Force is entitled to discovery only relative to the limited issues on remand: (1) whether the interest started too early; (2) whether the interest rate exceeded the contract rate; and (3) what was the proper date for the cessation of interest. Transaero is directed to produce its books and records relating to the Air Force account. We direct the Air Force and Transaero to conduct expedited discovery to be completed on or before

---

governing rule is often referred to as the "last in time rule." See *Americana Fabrics, inc. v. L & L Textiles*, Inc., 754 F.2d 1524, 1530 (9th Cir. 1985) (citing *Treines v. Sunshine Mining Co.*, 308 U.S. 66, 75-88, 60 S.Ct. 44, 49-50 (1939)); See also Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4404.

September 1, 1995. This Court will then conduct a hearing on these limited issues on Friday, September 15, 1995.

CONCLUSION

The Air Force's motion to vacate the default judgment as void for lack of jurisdiction, pursuant to Fed.R.Civ.P. 60(b), is DENIED. The Air Force's motion to stay non-jurisdictional proceedings is DENIED.

The Air Force and Transaero are ORDERED to conduct expedited discovery on the limited issues of the remand to be completed on or before September 1, 1995. The parties are further ORDERED to appear for a hearing to resolve the issues on remand, on Friday, September 15, 1995. We reserve decision on Transaero's motion to modify the judgment until the hearing has been completed.

And it is SO ORDERED.

/s/ Jacob Mishler
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No: 88-2788

August 22, 1995

TRANSAERO, INC.

Plaintiff,

-against-

LA FUERZA AEREA BOLIVIANA,
an instrumentality of the
REPUBLIC OF BOLIVIA, a Foreign State,

Defendant.

MEMORANDUM OF DECISION AND ORDER

MISCHLER, District Judge

The Air Force of the Republic of Bolivia's Motion for Reconsideration and Motion for Stay of Proceedongs is in all respects DENIED. The Court's direction for discovery is limited to the production by Transaero, Inc. of their relevant records. If during the trial of the issue there is good cause to believe other discovery is appropriate, the Court will consider it at the time.

And it is so ORDERED.

/s/ Jacob Mishler
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No: 88-2788

August 22, 1995

TRANSAERO, INC.

Plaintiff,

-against-

LA FUERZA AEREA BOLIVIANA,
an instrumentality of
THE REPUBLIC OF BOLIVIA, a Foreign State,

Defendant.

MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE JUDGMENT

---

* * * *

After obtaining its default judgment against the Air Force, Transaero waited 38 months before it filed suit in the District of Columbia to enforce its judgment. See Exh. 17. The Air Force moved to dismiss Transaero's complaint for lack of subject matter jurisdiction, arguing that notice was improper under the Foreign Sovereign Immunities Act. 28 U.S.C. § 1602 *et seq.* (1976). In preparing, briefing and

arguing that motion, the Air Force's former counsel made no inquiry at all into the underlying facts. Without benefit of such an inquiry, the District Court denied the Air Force's motion in a written opinion issued on September 25, 1992. See Exh. 18 (district court opinion).[2] In February 1993, the Air Force retained present counsel which undertook -- for the very first time for the Air Force -- an analysis of the underlying facts of the judgment. That investigation revealed the fraud perpetrated on this Court by the Jacobs Affidavit.

* * * *

---

[2] In his opinion, Judge Revercomb made no mention of General Gomez's Affidavit and, in apparent ignorance of that affidavit, stated that "there is no dispute that [the Air Force] received actual notice of Transaero's lawsuit." *Id.* at 2. The Air Force has appealed Judge Revercomb's opinion. See Exh. 19 (notice of appeal). The Air Force acknowledges that until overturned on its pending appeal, Judge Revercomb's opinion bars the Air Force from challenging the propriety of service under the Foreign Sovereign Immunities Act. See *Huron Corp. v. Lincoln Co.*, 312 U.S. 183, 188-89 (1941)(judgment on appeal is still final judgment); *Petrella v. Siegel*, 843 F.2d 87, 90 (2nd Cir. 1988)(judgment pending appeal entitled to res judicata effect); *United States v. NYSCO Laboratories, Inc.*, 318 F.2d 817 (2nd Cir. 1963) (same). Although barred by res judicata from contesting it, the Air Force in no way waives these issues. In this, its first responsive pleading, the Air Force preserves its challenges to Transaero's improper service of process and this Court's lack of personal and subject-matter jurisdiction under the Foreign Sovereign Immunities Act and the United States Constitution.

Respectfully Submitted,

WILLIAMS & CONNOLLY

By: /s/ Timothy S. Driscoll
Gregory B. Craig
James W. Shannon Jr.
Timothy S. Driscoll
TSD 3319

725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Date: May 10, 1993

* * * *

Exhibit 13

DECLARATION OF
GENERAL DARDO GOMEZ GARCIA

I, GENERAL DARDO GOMEZ GARCIA, under penalty of perjury under the laws of the United States of America, declare:

1. I am a Commanding General of Fuerza Aérea Boliviana (the "Bolivian Air Force") and am personally familiar with the duties, functions, structure an authority of the Bolivian Air Force. All factual statements contained herein are based upon my own personal knowledge.

2. The Constitution of the Republic of Bolivia provides for the establishment of a military defense force. The Bolivian Air Force was established pursuant to the Constitution.

3. The Bolivian Air Force is a branch of the military defense forces of the Republic of Bolivia and is an integral part of the Republic of Bolivia's political structure.

4. The primary function of the Bolivian Air Force is to provide for the defense of the borders, air space and sovereignty of the Republic of Bolivia.

5. The structure and principal function of the Bolivian Air Force is national defense and not commercial in nature.

6. The Bolivian Air Force exists by virtue of the Republic of Bolivia an any presence outside the Republic of Bolivia is at the express direction and control of the Republic of Bolivia.

7. The Bolivian Air Force maintains an office in the District of Columbia. The office is located in the Bolivian Embassy and is staffed exclusively with active-duty Bolivian Air Force officers on two year assignments from Bolivia, Bolivian Air Force officers on assignment in the United States are treated as diplomatic agents and report directly to the Bolivian Ambassador and the Head of the Bolivian Air Force.

8. All contracts negotiated between the Bolivian Air Force and any private entity such as Transaero, Inc. are at the express direction of the Bolivian Air Force itself.

9. The Bolivian Air Force purchased certain parts and material from Transaero, Inc. in 1981 and 1982.

10. No special agreement exists between the Bolivian Air Force and Transaero, Inc. for service of process or any judicial documents nor do any such arrangements exist between the Republic of Bolivia and Transaero, Inc.

11. Prior to February 28, 1992, the Bolivian Air Force was not aware that an action had been filed by Transaero, Inc. or that a Default Judgment had been entered on April

21, 1989 in the United States District court for the Eastern District of New York.

12. Furthermore, the Bolivian Air Force was not served with either the Garnishment Summons dated February 19, 1992 in the instant proceedings nor with a Spanish translation of the Garnishment Summons.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed on March 30, 1992

/s/ Dardo Gomez Garcia
General Dardo Gomez Garcia
LA FUERZA AEREA BOLIVIANA
LA PAZ — BOLIVIA

APPENDIX F

STATUTES INVOLVED

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other

ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter regatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Supreme Court, U.S.
F I L E D
APR 21 1997
CLERK

(2)

No. 96-1507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LA FUERZA AEREA BOLIVIANA,
an Agency or Instrumentality of the
Republic of Bolivia, a Foreign State,
Petitioner,

v.

TRANSAERO, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RONALD N. COBERT
Counsel of Record
ANDREW M. DANAS
GROVE, JASKIEWICZ AND COBERT
1730 M St., N.W., Suite 400
Washington, D.C. 20036
(202) 296-2900
Counsel for Respondent

---

21 pp

QUESTION PRESENTED

Is an agency or instrumentality of a foreign sovereign entitled to interlocutory appellate review of the district court's denial of its claim that a seven-old-default judgment entered against it is allegedly void for an alleged technical defect in service of process under the following circumstances:

(1) the district court has previously issued two separate decisions holding that both personal and subject matter jurisdiction existed over the agency or instrumentality at the time judgment was entered;

(2) the appellate court has already issued two decisions affirming those earlier rulings and has remanded the case back to the lower court for further proceedings to re-examine the proper calculation of interest contained in the judgment;

(3) the third district court ruling on jurisdiction for which the agency or instrumentality of the foreign sovereign seeks interlocutory appellate review was issued in the proceedings on remand from the two earlier appellate court decisions; and

(4) the proceedings on remand are not yet complete?

PARTIES BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties in the proceeding below were the following:

Transaero, Inc., a privately-held company which is headquartered in New York State. It has no parent companies, subsidiaries, or affiliates which have any outstanding securities in the hands of the public. Its primary line of business is in the aviation equipment and services industry.

La Fuerza Aerea Boliviana, the Air Force of the Republic of Bolivia.

GLOSSARY

Throughout this Petition, the term "FSIA" refers to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 -1611.

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. THE SECOND CIRCUIT'S DECISION PROPERLY FOLLOWED AND APPLIED THE PRECEDENT OF THIS COURT. ... 8

A. The Petitioner Is Not Claiming An Immunity From Suit But Merely An Immunity From Judgment. 8

B. A Foreign Sovereign Is Not Entitled To An Interlocutory Review Of A District Court Denial Of Its Motion To Set Aside A Seven-Year-Old Judgment Allegedly Void Due To Alleged Defective Service When The District Court Has Already Twice Held That It Had Personal and Subject Matter Jurisdiction Over The Foreign Sovereign And That Ruling Has Twice Been Affirmed By The Appellate Court. 10

II. THE SECOND CIRCUIT HAS NOT UNDERMINED THE UNIFORMITY OF FEDERAL LAW THAT WAS THE EXPRESS PURPOSE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT. 14

III. THE SECOND CIRCUIT'S DECISION CREATES NO UNCERTAINTY FOR FOREIGN SOVEREIGNS. IT HAS NO SIGNIFICANT FOREIGN POLICY IMPLICATIONS. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases Page No.

Caribbean Trading v. Nigerian National Petroleum,
948 F.2d 111 (1991) 13, 15, 16
Catlin v. United States,
324 U.S. 229 (1944) 9, 13
Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 15, 17, 18
Digital Equipment Corp. v. Desktop Direct, Inc.,
-- U.S.--, 114 S.Ct. 1992 (1994) 11
Drexel Burnham Lambert v. Committee of Receivers,
12 F.3d 317 (2d Cir. 1993) 10
Foremost-McKesson, Inc., v. The Islamic Republic of Iran,
905 F.2d 438 (D.C.Cir. 1990) 17
Imbler v. Pachtman,
424 U.S. 409 (1976) 15
Insurance Corp. of Ireland, Ltd.,
v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 17
Lauro Lines S.R.L. v. Chaser,
490 U.S. 495 (1989) 12, 15
McKesson Corporation v. Islamic Republic of Iran,
52 F.3d 346 (D.C.Cir. 1995) 12, 16, 17, 18
Midland Asphalt Corp. v. United States,
489 U.S. 794 (1989) 12
Mitchell v. Forsyth,
472 U.S. 511 10

Mobil Corporation v. Abeille General Insurance Co.,
984 F.2d 664 (5th Cir. 1993) 17, 18
Practical Concepts, Inc., v. Republic of Bolivia,
811 F.2d 1543 (D.C.Cir. 1987) 17
Pullman Construction Industries, Inc., v. United States,
23 F.3d 1166 (7th Cir. 1994) 12
Richardson-Merrell Inc. v. Koller,
472 U.S. 424 (1985) 15
State of Alaska v. United States,
64 F.3d 1352 (9th Cir. 1995) 11
Transaero, Inc., v. La Fuerza Aerea Boliviana,
115 S.Ct. 1101 (1995) 5
Transaero, Inc., v. La Fuerza Aerea Boliviana,
24 F.3d 457 (2d Cir. 1994) ..... *passim*
Transaero, Inc., v. La Fuerza Aerea Boliviana,
30 F.3d 148 (D.C. Cir. 1994) ..... *passim*
Transaero, Inc., v. La Fuerza Aerea Boliviana
38 F.3d 648 (2d Cir. 1994) ..... *passim*
Transaero, Inc., v. La Fuerza Aerea Boliviana,
99 F.3d 538 (2d Cir. 1996) ..... *passim*
United States v. Hollywood Motor Car Co.,
458 U.S. 263 (1982) 11
United States v. MacDonald,
435 U.S. 850 (1978) 11
Van Cauwenberghe v. Biard,
486 U.S. 517 (1988) 12, 13, 15

Statutes

28 U.S.C. § 1604 12
28 U.S.C. § 1608 12
28 U.S.C. § 1608(a) 4
28 U.S.C. § 1608(b). 3, 4
Federal Rule of Civil Procedure 60(b)(4) 4

Treatises

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* (2d ed. 1985) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LA FUERZA AEREA BOLIVIANA,
an Agency or Instrumentality of the
Republic of Bolivia, a Foreign State

Petitioner,

v.

TRANSAERO, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Transaero, Inc., Respondent herein, prays that Petitioner's request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case be denied.

STATEMENT OF THE CASE

There are many interesting legal issues in this case. However, the one that the Petitioner, the Bolivian Air Force, is asking this Court to review is not one of them. While a more

detailed history of this procedurally unique case is set forth below, all this Court really needs to know to dispose of the instant petition is that this case involves the repeated efforts of the Petitioner, the Bolivian Air Force, to challenge the validity of a default judgment rendered against it by the United States District Court for the Eastern District of New York in 1989. The 1995 district court order for which the Petitioner claims the right of interlocutory appellate review is the **third** ruling by the lower court judge that the 1989 judgment is valid. This decision was issued in proceedings on remand from **two** earlier Second Circuit decisions issued in 1994 which affirmed the lower court's two earlier rulings that it properly exercised jurisdiction over the Bolivian Air Force when entering judgment in 1989. *See, Transaero, Inc., v. La Fuerza Aerea Boliviana,* 24 F.3d 457 (2d Cir. 1994)("*Transaero I*"); *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 38 F.3d 648 (2d Cir. 1994)("*Transaero III*"). The second 1994 decision of the Second Circuit in *Transaero III* specifically reviewed and declined to void the 1989 judgment based on the split 1994 decision of the D.C. Circuit in *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 30 F.3d 148 (D.C.Cir.1994), *cert. denied*, 115 S.Ct. 1101 (1995)("*Transaero II*"), holding in collateral proceedings that the judgment was void due to allegedly defective service of process.

Petitioner never asked this Court to review these earlier decisions of the Second Circuit. Instead, in proceedings on remand from these two earlier decisions of the Second Circuit, it brought yet another motion in the lower court seeking to set aside the judgment on jurisdictional grounds. These proceedings are limited to verifying whether the amount of the 1989 judgment is correctly calculated. **They are being held at**

the request of the Petitioner as a result of the proceedings it initiated in 1993. They are not yet completed.

It is in this procedural context that the Second Circuit held that it lacked jurisdiction to hear the Petitioner's appeal. *Transaero, Inc., v. La Fuerza Aerea Bovliviana*, 99 F.3d 538 (2d Cir. 1996)("*Transaero IV*"). In insisting that it is entitled to an interlocutory appeal of the **third** decision of the lower court judge finding valid jurisdiction, the Petitioner is simply seeking to delay completion of the proceedings on remand and the ability of Respondent to enforce what has repeatedly been held to be a valid judgment.

Procedural History of the Case

In 1988, Respondent brought suit in the Eastern District of New York seeking recovery of a contractual breach of a finance agreement with the Bolivian Air Force. Every court addressing this issue has held that the Bolivian Air Force had actual notice of this suit and was properly served under *28 U.S.C. §1608(b)* as an agency or instrumentality of the Republic of Bolivia under the FSIA. *See, e.g., Transaero, Inc., v. La Fuerza Aerea Boliviana,* 30 F.3d 148 (D.C. Cir. 1994). However, the Air Force chose not to enter an appearance. A default was entered and, after notice and hearing, the Honorable Jacob A. Mishler, Senior Judge, entered a judgment against the Air Force in April, 1989.

The Air Force did nothing to set aside the judgment. In 1992, after having registered the judgment in the United States District Court for the District of Columbia, Transaero served interrogatories upon the Air Force in an effort to discover its assets. The Air Force then entered an appearance in the District of Columbia, seeking to quash discovery and declare the

judgment void on the grounds that it should have been served under the provisions of the FSIA governing service of process for foreign states, *28 U.S.C. §1608(a),* rather than agencies or instrumentalities of a foreign state, *28 U.S.C. §1608(b).* In September, 1992, the Hon. George Revercomb held that the Air Force was properly served under the FSIA and that the 1989 judgment was valid. The Air Force appealed this decision to the D.C. Circuit.

While the D.C. Circuit appeal was pending, the Air Force changed counsel and hired Williams & Connolly. In May, 1993, the Air Force voluntarily entered an appearance in the Eastern District of New York, alleging that the 1989 judgment was void under Federal Rule of Civil Procedure 60(b)(4) and claiming that the judgment had been procured by a "fraud on the court." Judge Mishler denied this motion in an unpublished decision, holding that the Eastern District did have subject matter jurisdiction in 1989 and dismissing the fraud on the court allegations as "straining credulity." Memorandum Decision and Order dated August 12, 1993, *Transaero v. La Fuerza Aerea Boliviana*, No. 88-CV-2788 (E.D.N.Y.). The Air Force appealed this decision to the Second Circuit. The very first sentence of the Air Force's opening brief on appeal in the Second Circuit stated that "The district court's subject matter jurisdiction is at issue in this appeal." Brief of Defendant-Appellant La Fuerza Aerea Boliviana at 1, *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 24 F.3d 457 (2d Cir. 1994)(No. 93-7903).

In April, 1994, the Second Circuit issued its first decision in this case, affirming Judge Mishler's ruling that the Eastern District had subject matter jurisdiction in 1989 and

rejecting the "fraud on the court" allegations. *Transaero v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir. 1994)(*"Transaero I"*). The Second Circuit did remand the case back to Judge Mishler for further limited proceedings to examine two issues that Transaero had neglected to address in its brief on appeal: whether the 1989 judgment was properly calculated based on the Air Force's allegations that interest had been charged for too many months and at the wrong rate. *Id.* The Air Force filed a petition for rehearing.

Although counsel for Transaero immediately informed the D.C. Circuit that it was their opinion that the ruling of the Second Circuit was dispositive of the matters on appeal in the D.C. Circuit, in June, 1994, the D.C. Circuit issued a split decision holding that the Air Force should have been served under provisions of the FSIA governing service of foreign states. It thus held that the 1989 judgment was void and unenforceable. *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994)(*"Transaero II"*). Transaero filed a petition for certiorari of this decision to this Court, which was denied. *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 115 S.Ct. 1101 (1995).

In the interim, the Second Circuit requested a briefing by the parties as to whether its earlier decision affirming the 1989 judgment should be set aside due to the D.C. Circuit's decision. Upon a full briefing, the Second Circuit reaffirmed the validity of the judgment and its earlier decision, and remanded the case back to Judge Mishler. *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 38 F.3d 648 (2d Cir. 1994)(*"Transaero III"*). In doing so, it further expanded the lower court's mandate to determine the proper date for

cessation of interest. *Id.* The Air Force did not seek this Court's review of either of the Second Circuit's decisions.

On remand in the Eastern District of New York from *Transaero I* and *III* in 1995, Transaero filed a motion to modify the judgment. The lower court has never ruled on that motion, however, because the Air Force brought a motion under Rule 60(b)(4) seeking to declare the judgment void based on the D.C. Circuit's decision. Judge Mishler denied that motion, again reaffirming the validity of the judgment, in decisions dated August 4, 1995 and August 22, 1995. *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 88-CV-2788 (E.D.N.Y.)(reproduced as Appendixes C and D to Petitioner's application). He ordered Transaero to produce limited discovery in accordance with the issues on remand from the Second Circuit, and scheduled a hearing date of September 15, 1995.

The Air Force subsequently filed an interlocutory appeal to the Second Circuit for a review of these orders. That court stayed the proceedings before Judge Mishler. After a full briefing and oral argument, the Second Circuit held that it lacked interlocutory jurisdiction over the appeal because the Air Force was not claiming that the 1989 judgment was void because it was immune from suit, only that it should not be subject to the judgment because it was allegedly void for alleged improper service. *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 99 F.3d 538 (2d Cir. 1996)("*Transaero IV*"). The Second Circuit remanded the case back to Judge Mishler so he could complete the limited proceedings mandated by its two 1994 decisions. The Air Force's petitions for rehearing and rehearing en banc were denied and the case returned to the

lower court on January 16, 1997. The Air Force subsequently filed its current writ for petition of certiorari to this Court, disposition of which is pending.

Simultaneous requests by the Air Force for emergency stays of the lower court proceedings on remand pending disposition of its instant petition were denied by both the Second Circuit and Justice Ginsburg on April 3, 1997. However, Judge Mishler has issued an order dated April 4, 1997, indicating that all proceedings in the lower court will be held in abeyance pending this Court's disposition of the instant petition.

REASONS FOR DENYING THE WRIT

This petition can and should be easily denied. The Petitioner, the Bolivian Air Force, has misstated the issue involved in this case. Notwithstanding its assertions to the contrary, the Bolivian Air Force is not claiming that it is immune from the jurisdiction of the United States courts, i.e., that it is entitled to sovereign immunity. All it is claiming is that a judgment entered against it in 1989, in proceedings that every court ruling on this issue has found it had actual notice of, is allegedly void due to an alleged technical defect of service of process.

The Air Force's claim is thus one of immunity from judgment, not immunity from suit. This distinction is clearly recognized in the precedent of this Court, which holds that claims of immunity from judgment are not final judgments entitled to immediate interlocutory review under the collateral order doctrine. The decision of the United States Court of Appeals for the Second Circuit relies upon and follows the

precedent of this Court. There is no conflict with the decisions of this Court, nor any need to review the Second Circuit's ruling.

Similarly, no great foreign policy issues are at stake in the Second Circuit's decision. Contrary to the assertions of the Petitioner, the federal appellate courts have all recognized and applied the same distinctions made by the Second Circuit in this case. While denials of claims involving subject matter jurisdiction over foreign sovereigns raise immediate questions regarding immunity from suit which allow interlocutory appeals, denials of other types of immunity claims are not immediately reviewable, because they involve claims of immunity from judgment.

The federal circuits have also held that foreign sovereigns - especially the Republic of Bolivia - are no different that private litigants with respect to their obligations in adhering to the rules governing procedure and jurisdiction in federal courts, especially with respect to bringing challenges to the validity of default judgments. There is thus no conflict in the federal circuits on this issue.

I. THE SECOND CIRCUIT'S DECISION PROPERLY FOLLOWED AND APPLIED THE PRECEDENT OF THIS COURT.

A. The Petitioner Is Not Claiming An Immunity From Suit But Merely An Immunity From Judgment.

The August, 1995 lower court rulings for which the Air Force seeks an interlocutory appeal merely refused to apply and

follow the decision of the United States Court of Appeals for the District of Columbia in *Transaero II. Transaero, Inc., v. La Fuerza Aerea Boliviana,* 30 F.3d 148 (D.C.Cir. 1994). In that decision, the District of Columbia Circuit never held that the Air Force was immune from suit under the FSIA. It merely held that the 1989 judgment that Judge Mishler rendered against the Air Force was void because, in that court's opinion, the Air Force had been improperly served as an agency or instrumentality under the provisions of Section 1608(b), rather than Section 1608(a), of the FSIA. That court's determination did not constitute a ruling immunizing the Air Force from suit on the underlying subject matter of Transaero's claims. It simply ruled that the 1989 judgment was unenforceable because personal jurisdiction over the Air Force had allegedly not been properly asserted.

Judge Mishler's August, 1995 rulings refusing to apply and follow the D.C. Circuit's decision are, from a procedural posture, thus no different than a denial of a motion to dismiss a complaint or vacate a judgement on personal jurisdiction grounds. Such motions are generally not subject to interlocutory appeal under the "collateral order" doctrine. *See generally, Catlin v. United States*, 324 U.S. 229, 236, 89 L Ed 918 (1944); Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d §* 3911.4, pages 421-426.

B. A Foreign Sovereign Is Not Entitled To An Interlocutory Review Of A District Court Denial Of Its Motion To Set Aside A Seven-Year-Old Judgment Allegedly Void Due To Alleged Defective Service When The District Court Has Already Twice Held That It Had Personal and Subject Matter Jurisdiction Over The Foreign Sovereign And That Ruling Has Twice Been Affirmed By The Appellate Court.

It is correct that most courts addressing the issue, including the Second Circuit, have held that immediate appellate court jurisdiction exists over interlocutory appeals of foreign sovereigns invoking immunity from suit under the Foreign Sovereign Immunities Act. However, as the Second Circuit clearly stated in an earlier case, such appeals have been permitted when the subject matter jurisdiction of the court under the FSIA is at issue. *Drexel Burnham Lambert v. Committee of Receivers,* 12 F.3d 317, 324 (2d Cir. 1993). An examination of this Court's decisions relied upon by the Second Circuit in its decision in this case indicates that a different result occurs when the sole question involved is one of improper service of process under the FSIA.

In *Mitchell v. Forsyth,* 472 U.S. 511, 526, 86 L Ed 2d 411, 425, this Court held that the "immunity from suit" exception allowing immediate appeal of orders denying immunity motions in otherwise non-final proceedings is intended to protect an entitlement not to stand trial under any circumstances, not merely a defense to liability. As the Ninth Circuit stated in holding that the denial of sovereign immunity to branches of the federal government is not an immediately appealable collateral order:

> [T]he Supreme Court has observed that "orders denying certain immunities are strong candidates for prompt appeal under § 1291." This is because certain immunities are more likely to meet the third prong of the *Cohen* analysis: where the immunity guarantees a "right not to stand trial," that right may be "irretrievably lost" if immediate review is not available. The Supreme Court in *Digital Equipment* [*Digital Equipment Corp. v. Desktop Direct, Inc.*, -- U.S.--, 114 S.Ct. 1992, 1998, 128 L. Ed.2d 842 (1994)] hastened to add, however, that "a party's ability to characterize a district court's decision as denying an irreparable 'right not to stand trial' altogether is [not] sufficient... for a collateral order appeal," because virtually every right or procedural step that can be enforced by pretrial dismissal could be characterized as a right not to stand trial."

State of Alaska v. United States, 64 F.3d 1352, 1355 (9th Cir. 1995)(citations omitted).

The Seventh Circuit has stated, in a case which also held that rulings denying claims of sovereign immunity by the United States are not immediately appealable, that it:

> is necessary to distinguish between a right not to be sued and a right the vindication of which ends the litigation. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269, 102 S.Ct. 3081, 3084, 73 L.Ed.2d 754 (1982); *United States v. MacDonald,* 435 U.S. 850, 860 n. 7, 98 S.Ct. 1547, 1552 n.7, 56 L.Ed.2d 18 (1978). Only an "explicit statutory or constitutional

> guarantee that trial will not occur" creates the sort of right that supports immediate review. *Midland Asphalt Corp. V. United States*, 489 U.S. 794, 801, 109 S.Ct. 1494, 1499, 103 L.Ed.2d 879 (1989). *See also, e.g., Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989).

Pullman Construction Industries, Inc., v. United States, 23 F.3d 1166, 1169 (7th Cir. 1994). Denials of claims of immunity from subject matter jurisdiction under the FSIA fall within this criteria, since that act specifically sets forth those circumstances under which a foreign sovereign may be sued in U.S. courts. Absent subject matter jurisdiction under the FSIA, foreign sovereigns are entitled to sovereign immunity from suit in U.S. courts. *See, 28 U.S.C. § 1604.* Accordingly, the denial of a claim of lack of subject matter jurisdiction under the FSIA constitutes a denial of a right not to be sued. *See, e.g., McKesson Corporation v. Islamic Republic of Iran*, 52 F.3d 346 (D.C.Cir. 1995).

However, the service of process provisions of the FSIA do not confer an immunity on foreign sovereigns from suit but merely set forth how a foreign sovereign must be served when it is otherwise subject to suit in a U.S. court due to the existence of subject matter jurisdiction under the FSIA. *See, 28 U.S.C. § 1608.* Invoking improper service of process under the FSIA alone is thus not a claim of immunity from suit, but merely a defense to liability.

As the Second Circuit correctly noted in the decision under review, in *Van Cauwenberghe v. Biard*, 485 U.S. 517, 526-527 (1988), this Court found that a claim of immunity from service of process under extradition statutes and treaties is different than a claim of immunity from suit because the right not to stand trial is not an essential aspect of the claim. This Court

thus held that a district court's denial of a motion to dismiss on such grounds is not an immediately appealable collateral order, citing *Catlin v. United States*, 324 U.S. at 236. *Id.*

Other federal appellate court decisions have applied this distinction to cases involving the Foreign Sovereign Immunities Act. For example, in *Caribbean Trading v. Nigerian National Petroleum*, 948 F.2d 111 (1991), the Second Circuit held that a district court order requiring a foreign sovereign to post security was not subject to immediate appeal under the collateral order doctrine even though the FSIA immunizes the property of foreign governments from attachment except under specified circumstances. The Second Circuit held that merely requiring the posting of security did not invoke the foreign sovereign's claim of the right not to be sued. As the Second Circuit stated:

> such an order is not analogous to either a sovereign immunity claim or an immunity claim under Section 1604. In those cases, costly proceedings would follow an erroneous denial of the claim unless the order were appealable. In such a case, the litigant, be it a domestic sovereign or foreign state, would ultimately prevail but only after bearing the cost of a trial. This ultimate success would not redress the erroneous denial of an immunity from trial itself.

948 F.2d at 114.

As in *Caribbean Trading* and *Van Cauwenberghe*, the claim of the Petitioner Air Force in this appeal is not that it has an absolute right not to stand trial, but merely that another court has found in a collateral proceeding that the 1989 judgment which forms the foundation of the proceedings before the lower court was based on improper service of process and should be

vacated. The right now being claimed by the Air Force is that it should be free of liability from the 1989 judgment, not that it should be free of having suit brought against it in the U.S. courts for the claims of Transaero reflected in that judgment.

Indeed, the Air Force has contended throughout these proceedings that should the judgment be vacated, Transaero would remain free to "refile its Complaint the next day and have a full judicial inquiry into its claims." Brief of Defendant-Appellant La Fuerza Aerea Boliviana at 14, *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 99 F.3d 538 (2d Cir. 1996)(No. 95-7855). Such an action would result in a full scale relitigation of Transaero's claims against it - exactly the opposite of any claim of an immunity from standing trial. The Air Force's claim is thus not one which would otherwise fall within the scope of those that are immediately appealable on grounds of a denial of immunity.

II. THE SECOND CIRCUIT HAS NOT UNDERMINED THE UNIFORMITY OF FEDERAL LAW THAT WAS THE EXPRESS PURPOSE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT.

The history of this case clearly demonstrates that the Second Circuit's decision does not undermine the uniformity of purpose of the Foreign Sovereign Immunities Act. Virtually every case that the Petitioner has cited to this Court in support of its claim that the federal circuit courts have adopted a rule allowing immediate interlocutory appeals of denials of sovereign immunity under the FSIA have involved challenges to the exercise of subject matter jurisdiction under that Act. As a matter of course, many of these cases also involve challenges to the exercise of personal jurisdiction. None of these cases have the same procedural posture as this case, where the

appellate court has already disposed of the subject matter and personal jurisdiction challenge of the foreign government in earlier rulings by holding that such jurisdiction existed prior to the entry of judgment.[1] *See, Transaero I* and *III*. This case may thus be one of first impression among the federal circuits.

The unique procedural context of this case makes it a poor candidate to review any questions this Court may have about the general right of foreign sovereigns to engage in interlocutory appeals, even with respect to challenges of service of process. All the Second Circuit has said in its most recent decision is that pursuant to the rulings of this Court, the Air Force must await the completion of the proceedings on remand before seeking a review of the **third** ruling of the lower court judge affirming the jurisdictional validity of the 1989 judgment. *See, Transaero IV, citing Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Lauro Lines S.R.L. v. Chaser*, 490 U.S. 495 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988); and *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985).

Since these proceedings are being held at the specific request of the Air Force as the result of proceedings that it initiated in 1993, this case is procedurally unlike those involving most foreign sovereigns, where a foreign government may seek an interlocutory appeal to review the first decision of a lower court

---

1. The Petitioner Air Force is attempting to seriously mislead this Court to the extent that it has stated that there is an open question of subject matter jurisdiction in this case. The Second Circuit explicitly disposed of this question in its decisions in *Transaero I* and *III*. Indeed, the opening sentence of the Air Force's first brief in its first appeal to the Second Circuit was "The subject matter jurisdiction of the district court is at issue in this appeal." Brief of Defendant-Appellant La Fuerza Aerea Boliviana at 1, *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir. 1994)(No. 93-7903).

as to whether both proper personal and subject matter jurisdiction exist over the foreign sovereign.

The purpose behind allowing immediate appeals of orders denying sovereign immunity to foreign governments under the FSIA is to avoid subjecting them to extensive litigation that they would be otherwise entitled to avoid by virtue of their sovereign immunity. *See, e.g., Caribbean Trading,* 948 F.2d at 114. *McKesson Corporation v. Islamic Republic of Iran*, 52 F.3d 346 (D.C.Cir. 1995). However, exactly the opposite is the situation in this case. Here, the Air Force voluntarily entered an appearance in the lower court in 1993 in an effort to set aside a default judgment. It voluntarily initiated and engaged in extensive litigation. It did not get what it wanted: both the district and appellate courts affirmed the existence of jurisdiction and the validity of the judgment. *See, e.g., Transaero I* and *III*. The most recent challenge brought by the Air Force simply represents a third bite at the apple. [2]

The Second Circuit's determination that the Air Force's appeal of Judge Mishler's August, 1995 orders must wait until Judge Mishler has completed the proceedings that the Second Circuit had previously remanded to him at the Air Force's request thus does not involve any uniform policy regarding the right of foreign sovereigns to be free from trial or intrusive proceedings under the Foreign Sovereign Immunities Act.

---

2. The Second Circuit has clearly ruled that proper personal jurisdiction is being exercised over the Air Force by refusing to vacate its decision in *Transaero I* in light of the D.C. Circuit's split decision in *Transaero II*. By refusing to set aside the judgment and ordering the Air Force to participate in additional proceedings on remand, the Second Circuit has clearly stated that personal jurisdiction exists. *Transaero III*. The August 4, 1995 lower court decision for which the Air Force seeks interlocutory appellate review merely sets forth and discusses the precedent of this Court that dictates such a result.

III. THE SECOND CIRCUIT'S DECISION CREATES NO UNCERTAINTY FOR FOREIGN SOVEREIGNS. IT HAS NO SIGNIFICANT FOREIGN POLICY IMPLICATIONS.

Finally, contrary to the contentions of the Air Force, the Second Circuit's decision does not create uncertainty for foreign sovereigns, especially the Government of Bolivia. The federal appellate courts have been very clear that with respect to questions of personal jurisdiction, foreign governments should pay careful attention to the fact that such challenges must be brought according to the procedural rules of the federal courts. Indeed, the D.C. Circuit has specifically cautioned the Government of Bolivia that should it so desire it may ignore proceedings brought against it in the U.S. courts and seek to bring jurisdictional challenges to enforcement of any default judgments rendered against it, but that it bears the procedural risks related to that tactic. *See, Practical Concepts, Inc., v. Republic of Bolivia,* 811 F.2d 1543, 1547-1548 (D.C.Cir. 1987).

The Second Circuit's decision is thus no different than those of other courts, including this Court, which have held that foreign sovereigns may waive challenges to personal jurisdiction, even if brought in interlocutory appeals, if not raised at the appropriate procedural posture. See, e.g., *Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 703-07, 102 S.Ct. 2099, 2104-07, 72 L.Ed.2d 492 (1982)(noting that a constitutional *in personam* jurisdiction claim is waived if not timely raised); *Foremost-McKesson, Inc., v. The Islamic Republic of Iran,* 905 F.2d 438, 443 (D.C.Cir. 1990)(holding that challenge to *in personam* jurisdiction would not be considered in interlocutory appeal since not properly raised below).

While due deference must and should be given to the

immunity of foreign sovereigns where appropriate and required by statute, the Foreign Sovereign Immunities Act in general treats foreign sovereigns as being ordinary litigants subject to the same rights and procedural rules of the federal courts as other litigants. The statute contains no explicit provisions allowing for interlocutory appeals, and the interlocutory appeals which have been allowed for foreign sovereigns have been developed by the courts pursuant to the guidelines of this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed 1528 (1949). *See, e.g., McKesson Corp. v. Islamic Republic of Iran,* 52 F.3d 346 (D.C. 1995); *Cf., Mobil Corporation v. Abeille General Insurance Co.,* 984 F.2d 664 (5th Cir. 1993)(order remanding removed case back to state court upon a finding that the defendant was not a foreign sovereign entitled to foreign sovereign immunity under the FSIA was not subject to immediate interlocutory appeal because Congress had not amended the statute governing such appeals.)

Uniformity and certainty for litigants arise from well-established and uniformly applied rules of procedure and jurisdiction. The Air Force is asking this Court to create an exception to the rules which govern all litigants, even foreign sovereigns. Exceptions to general rules create uncertainty, not vice versa. The petition should be denied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RONALD N. COBERT
Counsel of Record
ANDREW M. DANAS
GROVE,JASKIEWICZ AND COBERT
1730 M St., N.W., Suite 400
Washington, D.C. 20036
(202) 296-2900

Counsel for Respondent

Supreme Court, U.S.
FILED
MAY 1 1997
OFFICE OF THE CLERK

No. 96-1507

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LA FUERZA AEREA BOLIVIANA,
An Instrumentality of the
REPUBLIC OF BOLIVIA,
A Foreign State,
Petitioner,

v.

TRANSAERO, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER

GREGORY B. CRAIG
(Counsel of Record)
JOHN T. PARRY
WILLIAMS & CONNOLLY
725 Twelfth St., N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Petitioner
La Fuerza Aerea Boliviana

93 pp

TABLE OF AUTHORITIES

Page

CASES

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 5
Compania Mexicana de Aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354 (9th Cir. 1988) 6
Drexel Burnham Lambert Group Inc. v. Committee of Receivers, 12 F.3d 317 (2d Cir. 1993), *cert. denied*, 511 U.S. 1069 (1994) 6, 7
Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990) 5, 6
Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988) 6
Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 7
Saudia Arabia v. Nelson, 507 U.S. 349 (1993) 5
Segni v. Commercial Office of Spain, 816 F.2d 344 (7th Cir. 1987) 6
State of Alaska v. United States, 64 F.3d 1352 (9th Cir. 1995) 6
Stena Rederi AB v. Comision de Contratos del Comite, 923 F.2d 380 (5th Cir. 1991) 5
Transaero, Inc. v. La Fuerza Aerea Boliviana, 24 F.3d 457 (2d Cir. 1994) 2
Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 1101 (1995) 3, 6
Transaero, Inc. v. La Fuerza Aerea Boliviana, 38 F.3d 648 (2d Cir. 1994) 2, 3
Tubular Inspectors, Inc. v. Petroleos Mexicanos, 977 F.2d 180 (5th Cir. 1992) 5, 6
Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) . . . 6, 7
Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982) 5, 6

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 5

STATUTES AND RULES

28 U.S.C. § 1291 5
28 U.S.C. § 1604 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-1507

LA FUERZA AEREA BOLIVIANA,
An Instrumentality of the
REPUBLIC OF BOLIVIA,
A Foreign State,
Petitioner,

v.

TRANSAERO, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER

Petitioner La Fuerza Aerea Boliviana (the Bolivian Air Force) submits this reply in support of its Petition for Writ of Certiorari.

The issue presented by the Bolivian Air Force's Petition for Writ of Certiorari is straightforward: Is a foreign sovereign entitled to interlocutory review of its claim that it is not amenable to suit under the Foreign Sovereign Immunities Act? The answer is equally straightforward: Yes.

In its opposition, Transaero advances two primary arguments in an effort to avoid certiorari. First, it asserts that the Second Circuit has twice denied the Air Force's jurisdictional arguments. See Respondent's Brief in Opposition ("Brief") at 2, 4, 15 & n.1. Second, Transaero contends that interlocutory review is available only for questions of subject matter jurisdiction under the Foreign Sovereign Immunities Act, not for questions of personal jurisdiction. In addition to being wrong, these arguments only highlight the confusion and conflict engendered by the decision below. This Court should grant the writ of certiorari and summarily reverse the Second Circuit.

1. Transaero hinges its argument on the assertion that the Second Circuit has ruled not just once, but twice, that the Eastern District of New York had personal and subject matter jurisdiction over this case under the Foreign Sovereign Immunities Act. See Brief at 2, 4, 15 & n.1. Not true.

Nothing in the Second Circuit's first decision, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir. 1994), says anything about the district court's personal or subject matter jurisdiction under the Act.[1] To the contrary, the court noted the existence of an issue concerning notice of the suit, but explained that the issue "is now pending in the Circuit Court for the District of Columbia." *Id.* at 459 n.1; see also *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 38 F.3d 648, 649 (2d Cir. 1994).

---

[1] The court did affirm the district court's jurisdiction to hear a claim for interest instead of referring the claim to arbitration pursuant to the Eastern District's local rules, see *id.* at 461, but that ruling has nothing to do with jurisdiction or amenability to suit under the Foreign Sovereign Immunities Act.

Similarly, the Second Circuit's second decision, on rehearing and after the "notice" issue had been decided by the D.C. Circuit, explicitly *refused* to rule on jurisdiction: "without expressing any views as to [] the validity of Transaero's service upon BAF in initiating the Eastern District suit . . . we decline to grant the petition for rehearing." *Id.* at 650. As if that were not enough, the court made clear that the issue of amenability to suit remained open when it said, "We need not decide whether BAF is entitled to pursue a new Rule 60(b) motion in the Eastern District, now that the D.C. Circuit has declared the default judgment to be void." *Id.*

Admittedly, the Second Circuit's actions are curious, but not for the reasons Transaero suggests. The Second Circuit's decision is strange because that court and the Eastern District of New York explicitly refused to accord *res judicata* effect to the holding of the D.C. Circuit that the district court lacked personal jurisdiction over the Air Force. See *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995). Far from being a reason to deny *certiorari*, as Transaero suggests, see Brief at 9, the Second Circuit's failure to follow the D.C. Circuit's ruling has placed the Air Force in the predicament of simultaneously being entitled to sovereign immunity in the D.C. Circuit, yet forced to undergo further proceedings in the same case in the Second Circuit.[2]

---

[2] Notably, Transaero's opposition does not contest that the Air Force is a foreign sovereign within the meaning of the Foreign Sovereign Immunities Act. Thus, Transaero effectively concedes that both the Eastern District of New York and the Second Circuit erred in failing to treat the Air Force as a foreign sovereign entitled to immunity from personal jurisdiction unless and until properly served.

Only one court—the D.C. Circuit—has addressed the jurisdictional issues on the merits. The Second Circuit has refused to follow that decision and has refused even to hear the Air Force's interlocutory appeal on the issue of jurisdiction. This Court should summarily reverse and remand this case to the Second Circuit for a ruling on this issue.

2. Transaero attempts without success to erect a barrier between issues of subject matter jurisdiction and issues of personal jurisdiction under the Foreign Sovereign Immunities Act, and further asserts that the former give rise to interlocutory review, but that the latter do not.[3]

To make this argument at all, Transaero is forced to mischaracterize the decision of the D.C. Circuit as involving merely the issue of service of process. In fact, the D.C. Circuit ruled that the Air Force's claim could be heard on interlocutory review because "denial of a claim of sovereign immunity is an immediately appealable final order." *Id.* at 149-50. In other words, the D.C. Circuit recognized that the Air Force—when it invoked the service requirements of the Foreign Sovereign Immunities Act—was in fact raising a claim of sovereign immunity and that interlocutory review was appropriate. The Second Circuit reached the opposite conclusion with respect to the same claim and created a circuit conflict, which in itself is sufficient reason for this Court to grant the writ.

In fact, the D.C. Circuit was correct, and Transaero's assertions about interlocutory review are wrong. Transaero's purported differentiation between personal and subject matter jurisdiction under the Foreign Sovereign Immunities

---

[3] Importantly, Transaero does not even attempt to defend the Second Circuit's ruling that foreign sovereign immunity is only an immunity from judgment. Transaero's silence speaks volumes about the merits of that ruling.

Act exhibits a fundamental misunderstanding of both the structure of the Act and this Court's interpretations of it.

The Foreign Sovereign Immunities Act "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). The Act provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided." 28 U.S.C. § 1604. In interpreting this language, this Court has stressed that "a foreign state is presumptively immune from the jurisdiction of United States courts." *Saudia Arabia v. Nelson*, 507 U.S. 349, 355 (1993). To overcome this immunity, district courts are required, "[a]t the threshold of every action," to make an affirmative determination of personal and subject matter jurisdiction. *Verlinden*, 461 U.S. at 493-94.

The structure of the Act and this Court's decisions make clear, therefore, that both personal *and* subject matter jurisdiction are necessary to overcome a foreign sovereign's immunity to suit and that, conversely, the absence of either subject matter *or* personal jurisdiction means that a foreign sovereign, such as the Air Force, remains immune from suit.

In recognition of this fact, at least six circuits have held that a foreign sovereign's amenability to suit is subject to interlocutory review under 28 U.S.C. § 1291 and the "collateral order" doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[4] At least four circuits allow

---

[4] See *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 442-43 (D.C. Cir. 1990); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 814 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180 (5th Cir. 1992); *Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385 (5th Cir. 1991) ("the FSIA 'is an immunity from suit rather than a mere defense to liability; it is effectively lost if a case is

interlocutory appeals on personal jurisdiction.[5] Indeed, even the Second Circuit initially embraced this view before abandoning it in the case at bar. See *Drexel Burnham Lambert Group Inc. v. Committee of Receivers*, 12 F.3d 317, 323-24 (2d Cir. 1993) (granting interlocutory appeal for personal jurisdiction, among other issues, but not for posting of security), *cert. denied*, 511 U.S. 1069 (1994).

With the exception of the decision below, Transaero is unable to cite a single Foreign Sovereign Immunities Act decision to support its view of the difference between personal and subject matter jurisdiction under the Act. The cases cited by Transaero deal primarily with the waiver of the United States' own sovereign immunity in its own courts. Brief at 11-12. But as one of those cases expressly notes, that issue presents quite a different context from this case, which involves a sovereign's amenability to suit in a *foreign* state's courts. See *State of Alaska v. United States*, 64 F.3d 1352, 1355 (9th Cir. 1995). As for Transaero's reliance on *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), there

---

erroneously permitted to go to trial'"); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448 (6th Cir. 1988); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (interlocutory appeal allowed "to obtain an authoritative determination of [a foreign sovereign's] amenability to suit"); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354 (9th Cir. 1988) (same).

[5] See *Transaero*, 30 F.3d at 149-50 (D.C. Cir. 1994) (challenge to personal jurisdiction); *Foremost-McKesson*, 905 F.2d at 442-43 (D.C. Cir. 1990) ("numerous challenges" to "both subject matter and personal jurisdiction" on interlocutory appeal); *Velidor v. L/P/G Benghazi*, 653 F.2d at 820-21 (3d Cir. 1981) (personal and subject matter jurisdiction); *Tubular Inspectors*, 977 F.2d at 182 (5th Cir. 1992); *Gould*, 853 F.2d at 448 (6th Cir. 1988) (personal and subject matter jurisdiction and venue).

was no statute in that case that granted immunity from suit in the absence of personal jurisdiction, while the Foreign Sovereign Immunities Act performs exactly that function here. Moreover, the Court explicitly ruled in *Biard* that, unlike this case, the immunity at issue was solely an immunity from judgment, not immunity from suit. See *id.* at 525; see also Petition for Writ of Certiorari ("Petition") at 10.

In short, the uniform rule prior to the Second Circuit's decision below was that federal courts have appellate jurisdiction to hear an interlocutory appeal involving a foreign sovereign's amenability to suit—including questions of personal jurisdiction. Issues that do not concern a foreign sovereign's amenability to suit—such as a requirement that a foreign sovereign post security, see *Drexel Burnham Lambert*, 12 F.3d at 323-24—cannot be raised on interlocutory appeal. The Second Circuit's decision to disregard the judgment of the D.C. Circuit and dismiss the Air Force's appeal creates a direct conflict with at least four other Circuits. This Court should grant certiorari to reaffirm the structure and purpose of the Foreign Sovereign Immunities Act and to resolve the conflict among the circuits.

3. For all its bluff assertions that interlocutory review is unavailable, Transaero *never* attempts to discuss the application of the three factor test set out in *Cohen*. Worse still, Transaero omits any mention of *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), in which this Court resolved a circuit conflict and held that interlocutory review is available from a denial of Eleventh Amendment immunity. See Petition at 12-14 (discussing *Cohen* and *Metcalf & Eddy*).

Instead of grappling with these cases, Transaero asserts that the petition should be denied because the Air Force initiated these proceedings. Brief at 2-3, 15. As the Air Force's Petition explains, however, in moving to vacate the default

judgment, the Air Force explicitly raised and preserved its jurisdictional defenses under the Foreign Sovereign Immunities Act, defenses which at that time were pending in the D.C. federal courts. See Petition at 4 & n.3, 30a-31a. Whatever the Court might ultimately conclude on this question, it is hard to see what bearing it has on the issue before this Court, *i.e.*, whether the Second Circuit had jurisdiction to hear an interlocutory appeal involving a foreign sovereign's amenability to suit under the Act.

Finally, Transaero attempts to make much of the statement by the Air Force's counsel in a prior brief that Transaero is free to refile its case, attempt proper service, and receive a hearing on its claims. See Brief at 14. But this is nothing more than what Congress intended when it adopted the Act. In order to obtain federal court jurisdiction over a foreign sovereign, private parties must comply strictly with the terms of the Act. Transaero admittedly has not done so and apparently believes, along with the Second Circuit, that these statutory service requirements are mere technicalities. To the contrary, this Court and Congress have said that the service requirements of the Foreign Sovereign Immunities Act have a substantive purpose. This Court should grant certiorari to protect and to revive that purpose.

CONCLUSION

As a foreign sovereign, the Bolivian Air Force is not amenable to suit in United States courts unless all the jurisdictional requirements of the Foreign Sovereign Immunities Act are met. The Air Force contends—and the D.C. Circuit agrees—that those requirements were not met here. The Eastern District of New York refused to follow the D.C. Circuit and, despite the fact that every other circuit to address the issue has held that interlocutory review of such a decision is available, the Second Circuit has refused to hear the Air Force's appeal.

For the reasons stated above and in the petition, certiorari should be granted and the decision of the Second Circuit should be summarily reversed.

Respectfully submitted,

GREGORY B. CRAIG
(Counsel of Record)
JOHN T. PARRY

WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Petitioner
La Fuerza Aerea Boliviana

May 1, 1997